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No. 15533

United States
Court of Appeals
for the Ninth Circuit

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. - 5-17-57

FILED

MAY 27 1957

PAUL P. O'BRIEN, CLERK

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NAMES AND ADDRESSES OF ATTORNEYS

MESSRS. LANDIS & BRODY,
ALVIN LANDIS,

926 J Building,
Sacramento 14, Calif.,

Attorneys for the Plaintiffs.

LLOYD H. BURKE,

United States Attorney :

MERVIN D. MORGENSTEIN,

Assistant U. S. Attorney,
422 Post Office Building,
San Francisco 1, Calif.,

Attorneys for the U. S.



In the United States District Court for the Northern District of California, Northern Division

Civil No. 7250

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Count I

I.

This action is brought under the Federal Tort Claims Act, 28 U. S. C. 1346b, 2671 et seq.; and that the amount in dispute is in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, all of which hereinafter more fully appears.

II.

Plaintiff, Builders Corporation of America, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office in the City of Beverly Hills, County of Los Angeles, State of California.

III.

Plaintiff, Herlong Sierra Homes, Inc., is a corporation organized and existing under and by virtue

of the laws of the State of Nevada, with its principal office in the City of Reno, County of Washoe, State of Nevada. Herlong Sierra Homes, Inc., is licensed to do business in the State of California.

IV.

The defendant, the United States of America, acting through the Department of Defense, owns, operates, and maintains a military installation known as the Sierra-Ordnance Depot.

V.

Said Sierra-Ordnance Depot is a Federal enclave and is located in the County of Lassen, State of California, in a desolate and isolated area. The nearest points of urban development to said Sierra-Ordnance Depot are the City of Susanville in Lassen County, California, approximately forty miles northwest from said Depot, and the City of Reno in Washoe County, Nevada, approximately fifty-six miles southeast from said Depot. The military and civilian personnel, all of whom are agents and employees of the defendant, United States of America, necessary to operate and maintain said Depot are quartered on or near said Depot.

VI.

That the negligent or wrongful acts or omissions occurred in said Lassen County, State of California, within the jurisdiction of the United States Court of the Northern Division, of the Northern District, as herein more fully appears.

VII.

That Colonel G. H. Leavitt, at all times mentioned herein, was the Commanding Officer of the Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

VIII.

That Captain William K. Bouldin, at all times mentioned herein, was Assistant Post Engineer of said Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

IX.

That Joseph H. Gill, at all times mentioned herein, was Executive Assistant of said Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

X.

That Virgil Leigh, at all times mentioned herein, was a Civilian Personnel Officer of said Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XI.

That Herbert A. Hoyt, at all times mentioned herein, was Assistant Supply Officer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XII.

That C. Q. Johnson, at all times mentioned herein, was a Fiscal Officer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XIII.

The Federal Housing Administration was created by the National Housing Act approved June 27, 1934 (48 Stat. 1246, 12 U.S.C. 1702), as amended, and it functions as a constituent agency of the Housing and Home Finance Agency pursuant to Reorganization Plan 3 of 1947. The purpose of the Federal Housing Administration is to encourage improvements in housing standards and conditions, to provide a system of mutual mortgage insurance, and to exert a stabilizing influence on the mortgage market. It provides insurance against loss on loans made by private lending institutions. The Federal Housing Administration is authorized, under Title VIII of the National Housing Act, as amended, to insure mortgages on rental housing built by private

enterprise on or near military reservations for the use of civilian and military personnel of the Armed Forces, on certification by the Secretary of Defense. The Federal Housing Administration is authorized, under Title IX of the said National Housing Act, as amended, to insure mortgages on programmed housing in critical defense areas, whether such housing is for sale to persons qualified under the provisions of said National Housing Act, as amended, or is constructed as a rental project for such persons. Under authority of the Act of August 8, 1949 (63 Stat. 570), said Federal Housing Administration was authorized to insure mortgages on mortgaged property designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force (including Government contractor employees) assigned to duty at the military installation at or in the area of which such property is constructed. Said Act further provides that no such mortgage shall be insured unless the Secretary of Defense, or his designee, shall have certified to the Commissioner of the Federal Housing Administration that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

XIV.

That the Federal National Mortgage Association was organized pursuant to the provisions of Title

III of the said National Housing Act, as amended, and was transferred to the Housing and Home Finance Agency as one of its constituent agencies by Reorganization Plan 22 of 1950, effective July 10, 1950, and becoming effective September 7, 1950. Said Federal National Mortgage Association is an agency of the defendant, United States of America, established by the Congress to provide a secondary market for mortgages insured by the Federal Housing Administration and is authorized to purchase, service, or sell any mortgages which are insured under the said National Housing Act, as amended. Said Federal National Mortgage Association provides credit to assist veterans and others eligible for such credit assistance under the provisions of said National Housing Act, as amended, and, as one of its authorized functions, purchases mortgages from mortgagees approved by the Federal Housing Administration.

XV.

The Housing and Home Finance Agency was established by the President's Reorganization Plan 3 of 1947, effective July 27, 1947, (12 Fed. Reg. 4981) and is an agency of the defendant, United States of America, responsible for guiding the activities of the defendant, United States of America, in the field of housing to accomplish the objectives set forth in the National Housing Act as amended.

XVI.

By reason of the isolated location of said Sierra-Ordinance Depot, the defendant, The United States

of America, acting through the Department of Defense, had constructed housing at said Sierra-Ordnance Depot for the use of civilian and military personnel of said Depot; that said housing was constructed for temporary use and had become inadequate for the purposes for which it had been constructed.

XVII.

On or about the 6th day of July, 1950, in accordance with the provisions of the National Housing Act, as amended, the said Department of Defense entered into negotiations with the Federal Housing Administration and the Housing and Home Finance Agency to obtain construction of four hundred fifty-six (456) dwelling units to adequately house civilian and military personnel employed at said Sierra-Ordnance Depot; that to induce the Federal Housing Administration to insure mortgages for such construction and thereby obtain private persons and private lending institutions who would be willing to undertake and contract to construct said dwelling units, the said Department of Defense represented to said Federal Housing Administration and to said Housing and Home Finance Agency that by reason of a substantial in-migration of defense workers and military personnel needed for the operation, maintenance, and fulfillment of the primary function of said Sierra-Ordnance Depot, there existed a shortage of housing facilities for said Sierra-Ordnance Depot which impeded or threatened to impede the operation of said Sierra-Ordnance Depot,

and that said Sierra-Ordnance Depot was a critical defense housing area; that the existing housing at said Sierra-Ordnance Depot utilized for the housing of military and civilian personnel was inadequate from the standpoint of space allowance, heating and plumbing facilities, and electrical outlets; that the kitchens and bedrooms of said existing houses lacked modern appliances; that seven hundred seventy (770) apartments of said existing houses used coal burning stoves for heating and coal ranges for cooking and water heating. It was further represented to said Federal Housing Administration and said Housing and Home Finance Agency that the turnover in personnel at said Sierra-Ordnance Depot was largely due to inadequate housing and that inadequate housing was the cause of morale and welfare problems; it was further represented to said Federal Housing Administration and Housing and Home Finance Agency that respiratory diseases have increased due to overcrowdedness in the housing area and that as many as nine persons in a family occupy a unit of approximately five hundred feet; it was further represented to said Federal Housing Administration and Housing and Home Finance Agency that to assure the insurability of housing to be constructed under the authority of the said National Housing Act, as amended, certain existing housing on said Sierra-Ordnance Depot would be modified to permit larger family units, relieving the overcrowdedness then existing in the housing on said Sierra-Ordnance Depot, and that a number of the

other existing housing would be destroyed and thereby make available civilian and military personnel to occupy the housing to be constructed under authority of said National Housing Act, as amended, and thus assure the return of any expenditures made by the said Federal Housing Administration and Housing and Home Finance Agency in connection with the insurance to be granted to any person agreeing to construct said housing on or near the said Sierra-Ordinance Depot.

XVIII.

That thereafter on, to wit, the 24th of October, 1951, the Secretary of the Army, acting in pursuance of his authority, certified to the Federal Housing Administration, that one hundred thirteen (113) family units in multiple family structures and twelve (12) single family structures were necessary to provide adequate rental housing for civilian and military personnel assigned to duty at said Sierra-Ordinance Depot, that such military installation was deemed to be a permanent part of the Department of the Army, and that there was no present intention to substantially curtail activities at such installation. It was further certified by said Secretary of the Army that the military and civilian personnel who were expected to occupy the said dwelling units and for whom said rental housing was intended, would be capable of paying the proposed monthly rentals per family unit as set forth in said certifications.

XIX.

That by virtue of the request of the Department of the Army, the said Housing and Home Finance Agency, with the approval of the Department of the Army, programmed one hundred fifty (150) family dwelling units for rental housing for the civilian and military personnel of said Sierra-Ordnance Depot, and to meet the housing needs of essential immigrant defense workers, including members of the Armed Forces, employed in or stationed at the Sierra-Ordnance Depot, and by reason thereof, the Federal Housing Administration, under authority of the said National Housing Act, as amended, agreed to insure any mortgages on said dwelling units.

XX.

Thereafter, by reason of the representations made by the Department of the Army and the commitment of the Federal Housing Administration to insure a mortgage in the amount of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars (\$1,113,700.00), the plaintiff, Herlong Sierra Homes, Inc., filed its application, received approval, and thereafter undertook to construct one hundred twenty-five (125) dwelling units in accordance with specifications, plans and drawings issued and approved by the Department of the Army and Federal Housing Administration and in accordance with the provisions of said National Housing Act, as amended, and the rules and regulations promulgated thereunder. Plaintiff, Herlong Sierra Homes, Inc., agreed to reserve the completed dwelling units

for rent to civilian and military personnel of said Sierra-Ordnance Depot at approved rentals to be charged for said dwelling units as follows:

- 43 units at a rental of \$70.00 per month;
- 30 units at a rental of \$73.40 per month;
- 16 units at a rental of \$83.40 per month;
- 10 units at a rental of \$91.25 per month;
- 9 units at a rental of \$96.25 per month;
- 3 units at a rental of \$111.25 per month.

XXI.

That the plaintiff, Herlong Sierra Homes, Inc., obtained a mortgage loan from the Manufacturers Trust Company of New York in the sum of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars (\$1,113,700.00), which said loan was to be refinanced by the Manhattan Savings Bank of New York and to be secured by a mortgage on said dwelling units and other property executed by plaintiff, Herlong Sierra Homes, Inc., and insured by the Federal Housing Administration; that said lending institutions were and are approved as such by the Federal Housing Administration.

XXII.

That the plaintiff, Herlong Sierra Homes, Inc., was approved by the said Federal Housing Administration as the mortgagor for said loan and thereafter fully complied with all of the conditions and requirements for the construction of said dwelling units and all of said dwelling units were completed and ready for occupancy in January, 1954.

XXIII.

That the plaintiff, Builders Corporation of America, by reason of the representations made by the Department of Defense and the commitment of the Federal Housing Administration to insure a mortgage of One Million Two Hundred Sixty-one Thousand Three Hundred Dollars (\$1,261,300.00) for the dwelling units programmed by the Housing and Home Finance Agency filed its application, received approval, and thereafter undertook to construct one hundred fifty (150) dwelling units in accordance with plans, specifications, and drawings issued and approved by the Department of Defense and Federal Housing Administration and in accordance with the provisions of the said National Housing Act, as amended, and the rules and regulations promulgated thereunder. Plaintiff, Builders Corporation of America, agreed to reserve the completed dwelling units for sale or rent to civilian and military personnel of said Sierra-Ordnance Depot at approved sales prices and that the rentals to be charged for said dwelling units were to be as follows:

- 5 units at a rental of \$65.00 per month;
- 91 units at a rental of \$75.00 per month;
- 54 units at a rental of \$85.00 per month.

XXIV.

That plaintiff, Builders Corporation of America, obtained a loan in the sum of One Million Two Hundred Sixty-one Thousand Three Hundred Dol-

lars (\$1,261,300.00) from the California Bank of Los Angeles, which said loan was to be purchased by the Federal National Mortgage Association and secured by a mortgage on the said dwelling units and other property executed by the plaintiff, Builders Corporation of America; that said Federal National Mortgage Association is authorized by law to purchase said mortgages and that said mortgage was insured by the Federal Housing Administration.

XXV.

That plaintiff, Builders Corporation of America, was approved by said Federal Housing Administration as the mortgagor for said loan and fully complied with all of the conditions and requirements for the construction of said dwelling units and said dwelling units were ready for occupancy in August, 1954.

XXVI.

That the total sum expended or obligated by plaintiff for the construction of said dwelling units amounted to the sum of Six Hundred Thousand Dollars (\$600,000.00), in addition to the sum of Two Million Three Hundred Seventy-five Thousand Dollars (\$2,375,000.00) obtained by plaintiff under said loans.

XXVII.

That on, to wit, the 23rd day of January, 1954, the Commanding General, Sixth Army, Department of Defense, acting within authority duly granted him, notified Colonel G. H. Leavitt then and there

the Commanding Officer of the Sierra-Ordnance Depot, that the housing constructed by plaintiffs was not being occupied by personnel of the Sierra-Ordnance Depot and directed said Commanding Officer to initiate and develop a co-ordinated and aggressive program to assure maximum occupancy.

XXVIII.

That on, to wit, the 28th day of April, 1954, the Commanding General, Sixth Army, Department of Defense, acting within the authority duly granted him, notified Colonel G. H. Leavitt then and there Commanding Officer of the said Sierra-Ordnance Depot, that no major difficulties in obtaining full occupancy of the dwelling units constructed by plaintiffs herein at said Sierra-Ordnance Depot was expected, and said Commanding General, acting under authority duly granted him, directed that in order to accellerate full occupancy of said dwelling units and to present maximum opportunity to those not able to afford the rents required to be paid for said dwelling units, income limitations commensurate with the size of the family to be established for those who were to be permitted to occupy the government housing. It was further directed that, in the event said action did not bring about the desired result, steps should be taken to demolish certain of the temporary housing units, as was initially agreed upon and considered when the dwelling units to be constructed by plaintiffs were authorized at said Sierra-Ordnance Depot.

XXIX.

That on, to wit, the 24th day of June, 1954, under authority of the Commanding General, Sixth Army, orders and directives were issued to Colonel G. H. Leavitt, then and there the Commanding Officer of the Sierra-Ordnance Depot, as follows:

(a) An income limitation (with a sliding scale for dependents) to be established above which military and civilian personnel at Sierra-Ordnance Depot would not be permitted to occupy present government housing.

(b) Notice to be served on all tenants of the government housing whose incomes were above the salary limit as directed that their quarters be vacated not later than the 1st day of September, 1954.

(c) Notice to be served on tenants of government housing who were not employees of the Department of the Army, but rendering services to the Sierra-Ordnance Depot that, unless there was some contract or operating agreement which guarantees these persons on post housing, to vacate their government housing not later than the 1st day of September, 1954.

(d) To select a total of one hundred twenty-five (125) sets of substandard family quarters for disposal.

XXX.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A.

Hoyt, and C. Q. Johnson, agents and employees of the defendant United States of America, knew that by reason of the isolated area in which said dwelling units constructed by plaintiffs were located, the only available occupants and tenants for said dwelling units were the military and civilian personnel for whom said rental units had been programmed, authorized, and constructed; that after completion of said dwelling units, the plaintiffs would be required to expend large sums of money for payment on the principal and interest on mortgages, taxes, and in operation and maintenance of the property; that without rental income from said dwelling units, plaintiffs would be unable to meet those obligations without great loss.

XXXI.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant, United States of America, acting within the scope of their respective offices and employment, with intention of damaging plaintiff's, deliberately, intentionally, and wilfully failed and refused to carry out the orders issued as aforesaid and failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by plaintiffs; failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of the Sierra-Ordnance Depot; failed and refused to take

any action to demolish any of the temporary and substandard housing; and failed and refused to issue notices to those specified in said orders to vacate government housing not later than the 1st day of September, 1954.

XXXII.

That United States of America, Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and their respective offices and employment, and for the purpose of preventing and delaying compliance with the orders and directives heretofore alleged and to circumvent such orders and directives so as to prevent the military and civilian personnel from occupying said rental housing, did represent to the Commanding General, Sixth Army, and to the Federal Housing Administration and to the Housing and Home Finance Agency that plaintiffs had improperly constructed said housing in that there were, among others, the following structural defects:

Water Seepage through pumice block walls.

Nails working out of woodwork through plaster and painted interior walls.

Inadequate operation of washing machines, due to low water pressure.

Unsatisfactory operation of gas range burners.

Washing away of cement used with ceramic tile.

Porosity resulting in sand seeping in through cracks and around doors and windows at junctions of the ceilings and walls and exhaust areas over gas ranges.

Unsatisfactory floors.

Low water pressure, and dangerous conditions in case of fire by reason thereof.

Deficiencies in roads serving these dwelling units.

Inadequacy of gas space heating units.

Inadequate clothes lines and other structural defects.

That by reason of such structural defects, the military and civilian personnel could not live in said housing; that the plaintiffs were charging rentals in excess of the agreed rentals; that plaintiffs had imposed high utility costs;

that each and all of said representations were false and untrue and that Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, and each of them, knew said representations were false and untrue, and were made by them, and each of them, for the sole purpose of circumventing the orders and directives issued by the Commanding General of the Sixth Army and justifying their disobedience of said orders; that said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope

of their authority and employment, made similar misrepresentations to the military and civilian personnel employed at Sierra-Ordinance Depot to induce, persuade, coerce, and entice said military and civilian personnel from moving into the dwelling units constructed by plaintiffs; that said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and employment, by threats and intimidation and abuse of the authority vested in them by virtue of their respective positions, sought to and did preclude and prevent said military and civilian personnel from moving into said dwelling units constructed by plaintiffs, and said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and employment, attempted to and did induce and incite the military and civilian personnel to interfere with the occupancy of said dwelling units, and of the rights and privileges granted by the United States to the plaintiffs.

XXXIII.

That by reason of the wrongful acts of the defendant, its employees and agents, plaintiffs incurred a loss in rental income and were otherwise damaged in the sum of Three Million Four Hundred Seventy-five Thousand no/100 Dollars (\$3,475,000.00).

Wherefore, plaintiffs pray for judgment in the amount of Three Million Four Hundred Seventy-five Thousand and no/100 (\$3,475,000.00), for costs of suit and for such other and further relief as to the court may seem proper.

Count II.

As and for a Second Cause of Action Plaintiffs
Allege:

I.

Plaintiffs reaffirm and especially refer to paragraphs I to XXX of the first cause of action herein set forth, and ask that they be taken as and made a part of this cause of action the same as if specifically set forth in haec verba.

II.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, acting within the scope of their respective offices and employment, carelessly and negligently failed and refused to carry out the orders issued as aforesaid, and carelessly and negligently failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by plaintiffs, and carelessly and negligently failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of

the Sierra-Ordinance Depot; and carelessly and negligently failed and refused to demolish any of the temporary and substandard housing; and carelessly and negligently failed and refused to issue notices to those specified in said orders to vacate government housing not later than September 1, 1954.

III.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and their respective offices and employment, inspected the dwelling units constructed by plaintiffs in so careless, negligent, and perfunctory manner and said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, relying on rumor and hearsay, represented to the Commanding General, Sixth Army, and to the Federal Housing Administration and to the Housing and Home Finance Agency that plaintiffs had improperly constructed said housing in that there were, among others, the following structural defects:

Water seepage through pumice block walls.

Nails working out of woodwork through plaster and painted interior walls.

Inadequate operation of washing machines, due to low water pressure.

Unsatisfactory operation of gas range burners.

Washing away of cement used with ceramic tile.

Porosity resulting in sand seeping in through cracks and around doors and windows at junctions of the ceiling and walls and exhaust areas over gas ranges.

Unsatisfactory floors.

Low water pressure, and dangerous conditions in case of fire by reason thereof.

Deficiencies in roads serving these dwelling units.

Inadequacy of gas space heating units.

Inadequate clothes lines and other structural defects.

That by reason of such structural defects, the military and civilian personnel could not live in said housing; that the plaintiffs were charging rentals in excess of the agreed rentals; that plaintiffs had imposed high utility costs.

That each and all of said representations were false and untrue; that said misrepresentations resulting from the careless and negligent inspection made by said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, were made also to the military and civilian personnel employed at said Sierra Ordnance Depot and as a proximate and direct result of said careless and negligent inspection and misrepresentations, said military and civilian personnel refused to rent or occupy the dwelling units constructed by plaintiffs.

IV.

That by reason of the negligent and careless acts of the defendant, its employees and agents, plaintiffs incurred a loss in rental income and were otherwise damaged in the sum of Three Million Four Hundred Seventy-five Thousand and no/100 Dollars (\$3,475,000.00).

Wherefore, plaintiffs pray for judgment in the amount of Three Million Four Hundred Seventy-five Thousand and no/100 (\$3,475,000.00), for costs of suit and for such other and further relief as to the court may seem proper.

Dated: June 24, 1955.

LANDIS AND BRODY,

By /s/ ALVIN LANDIS,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: Landis and Brody, Attorneys at Law, Room 1108, 926 J Building, Sacramento 14, California:

Please Take Notice that on Monday, June 18, 1956, at 9:30 a.m. in the courtroom of the Master Calendar Judge, United States Courthouse and

Post Office Building, Sacramento, California, the defendant will move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action because the court lacks jurisdiction over the subject matter of the action pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C., Section 1346(b), 2671, et seq. (1952).

LLOYD H. BURKE,

United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,

Assistant United States
Attorney.

Affidavit of mail attached.

[Endorsed]: Filed May 26, 1956.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This is an action to recover damages against the United States of America under the provisions of the Federal Tort Claims Act (28 U.S.C.A., §§ 2671, et seq., and § 1346(b)) for the alleged loss of anticipated rental income from dwelling units constructed by plaintiffs adjacent to the Sierra Ordnance Depot, a military installation of the United

States near Herlong, California. Plaintiffs allege that pursuant to a declared public policy of the United States to stimulate and encourage private construction of dwelling units to alleviate the acute housing shortages near federal military installations (Chapter 403, Public Law 211, 81st Congress, 1st Session [63 Stat. 570; 12 U.S.C.A. §§ 1748, et seq., as amended]), the Secretary of the Army on October 24, 1951, certified to the Federal Housing Administration that a need for housing facilities for base personnel of the Sierra Ordnance Depot existed. Plaintiffs further allege that thereafter the Federal Housing Administration, acting pursuant to statutory authority (12 U.S.C.A., §§ 1702, et seq., as amended), agreed to insure mortgages in the amount of \$1,113,700 on 125 dwelling units to be constructed by plaintiff, Herlong Sierra Homes, Inc., and to insure mortgages in the amount of \$1,261,000 on 150 dwelling units to be constructed by plaintiff, Builders Corporation of America, all of which said dwelling units were to be constructed adjacent to the Sierra Ordnance Depot. Plaintiffs further allege that the Commanding General of the Sixth Army issued an order to the Base Commander of the Sierra Ordnance Depot directing him to follow certain procedures set forth in the order for the general purpose of compelling base personnel to vacate the homes, in which they were then living, and become tenants of the plaintiffs "not later than September 1, 1954." It is alleged that the Base Commander failed and refused to carry out this order, and it is on this alleged failure

and refusal that plaintiffs seek to found their two causes of action. The first cause of action is predicated on the theory that the Base Commander refused to carry out the aforementioned order with the intent to injure plaintiffs' business interests, and prevent plaintiffs from entering into an anticipated business relationship with the base personnel. The second cause of action is predicated on the theory that the Base Commander's alleged failure to carry out the order and plan submitted to him was negligence which directly caused plaintiffs' loss of rental income. Damages in the sum of \$3,475,000 are sought on both causes of action.

Defendant has filed a motion to dismiss based, generally, on the contention that neither cause of action is cognizable under the provisions of the Federal Tort Claims Act, the alleged tortious conduct of the Base Commander having arisen in the course of exercising a "discretionary" function or duty (28 U.S.C.A., § 2680(a)). Defendant further contends, *inter alia*, that the first cause of action is grounded on the tort of interference with contractual relations within the meaning of Title 28 U.S.C.A. § 2680(h), and, hence, is barred by the exclusion provisions of the Act. Defendant contends that the second cause of action fails to state a claim in negligence for the reason that defendant owed no duty to plaintiffs to protect plaintiffs from the type of loss which they suffered.

The alleged wrongful act of the Base Commander for which plaintiffs seek a recovery under their first

cause of action appears to be the tort of "interference with prospective advantage" (Prosser on Torts, p. 745 [2d Ed., 1955]), sometimes labeled "interference with prospective contracts or business relations" (*Masoni vs. Board of Trade*, 119 Cal. App. 2d 738, 260 Pac. 2d 205). Since Congress has decided not to surrender the immunity of the United States from tort actions based on interference with contract relations (28 U.S.C.A., § 2680 (h)), the essential issue which this Court must decide, then, is whether the tort of interference with prospective advantage or prospective contracts is properly includable within the aforementioned exception to the Tort Claims Act. It would seem to be quite illogical to conclude that Congress intended to exclude one tort from the operation of the Act, and, at the same time, waive the Government's immunity from actions sounding in a substantially identical tort; the distinction between the two being one of degree, only, in the elements necessary to establish liability.¹ Congressional intent need not be further pondered, however, for under the substantive tort law of California, by which we are bound in this case (cf. *Massachusetts Bonding Co. vs. United States*, 352 U. S. 128), no distinction be-

¹Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor. In one case the interference takes place when a contract is already in existence, in the other, when a contract would, with certainty, have been consummated but for the conduct of the tortfeasor. (See Prosser on

tween "interfering with contract relations" and "interfering with prospective contract or business relations" is recognized except in the factual situations which are considered essential to the existence of liability for the substantive tort of "interference."² Thus, in *Masoni vs. Board of Trade*, *supra*, at p. 741, it was stated:

"Actionable interference of this kind is not limited to inducing breach of an existing contract or other wrongful conduct but comprises also unjustifiably inducing a third person not to enter into or continue a business relation with another." (Citing the Restatement of Torts, § 766(a) and (b).)

(See also: *Campbell vs. Rayburn*, 129 Cal. App. 2d 232; *Guillory vs. Godfrey*, 134 Cal. App. 2d 628; *Wilson vs. Loew's, Inc.*, 142 A.C.A. 191; and 28 Cal. Jur. 2d 427, *Interference*, §§ 7 and 8.)

Few federal cases have dealt with the exclusion of interference with contract relations from federal

Torts. pp. 720, et seq., and pp. 745, et seq. [2d Ed. 1955]). Rather than characterizing the two as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, *inter alia*, an interference with an existing contract or a contract which is certain to be consummated, with broader grounds for justification of the interference where the latter situation is presented.

²Note 1, *supra*.

tort liability,³ but the case of *Fletcher vs. Veterans Administration*, 103 F. Supp. 654 [E. D. Mich.], provides a helpful analogy. In that case plaintiff operated a school supported primarily by veteran enrollees, but the Veterans Administration, for undisclosed reasons, thereafter advised the veterans against enrolling in the school with the result that plaintiff was left with empty classrooms, and was forced to discontinue his operations. The ensuing

³Only two have been found, *Nicholson vs. United States*, 177 F. 2d 768, and *Fletcher vs. Veterans Administration*, 103 F. Supp. 654. The *Nicholson* case held merely that an action between two parties to a contract for injuries caused by the negligence of one, was not an action for interference with contractual relations. The *Fletcher* case is discussed in the main text.

Plaintiffs contend that the case of *Oman vs. United States*, 179 F. 2d 738, is determinative of the question. In that case, the Court permitted the plaintiff to maintain an action against the United States for damages arising out of the government's permitting third persons to invade plaintiff's exclusively granted grazing territory on the public domain. The principal question before the Court in that case was whether the action was barred by the discretionary function exception in Title 28, U.S.C.A., § 2680(a), the Court holding that the government agents had no discretion to pursue a course of conduct tantamount to a revocation of plaintiff's exclusive grant without employing the established procedure to effect such a revocation. The action clearly was not based on the tort of interference with contract relations, but was more closely akin to an action in the nature of trespass. With facts so materially different, the holding in the *Oman* case was clearly not addressed to the issue before the Court in the case at bar.

action against the Veterans Administration for "negligence" in causing the loss of existing and future business opportunity was dismissed as an action based on interference with contract rights within the meaning of § 2680(h), Title 28, U.S.C.A.

In view of the foregoing authorities, this Court is of the opinion that the United States did not waive its immunity from the type of claim which plaintiffs assert by their first cause of action, hence, no useful purpose would be served by here ruling on defendant's contention that this cause of action is likewise barred under the "discretionary function" exception enunciated in § 2680(a), *supra*.

In order to recover damages on their second cause of action, based on negligence, it is essential that plaintiffs allege and prove that defendant owed them a duty to conform to a standard of conduct which would prevent the kind of injury which plaintiffs allegedly suffered. This is the rule in California (*Routh vs. Quimm*, 20 Cal. 2d 488), and is likewise applicable to actions based on negligence under the Federal Tort Claims Act (*The Dalles City vs. River Terminals Company*, 226 F. 2d 100; *Social Security Admin. Baltimore F.C.U. vs. United States*, 138 F. Supp. 639; *Mid-Central Fish Co. vs. United States*, 112 F. Supp. 792, *aff'd* 210 F. 2d 263; and *Anglo-American and Overseas Corp. vs. United States*, 144 F. Supp. 635).

What the scope of duty is in any given case seldom admits of easy definition. Perhaps the most

helpful analysis is tendered by Dean Prosser in his treatise on torts, where he states:

“The statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” (Prosser on Torts, p. 167 [2d Ed. 1955].)

Plaintiffs’ contentions in this regard are based essentially on a theory that Congress, by enacting laws designed to encourage the construction by private businesses of dwelling facilities near military installations, intended to create a duty on the part of the commanding officers of such installations to provide the owners of such housing facilities with tenants so that their investment would be a profitable one. However, an analysis of the statutory provisions (12 U.S.C.A., §§ 1748, et seq.), and their legislative history (House Report No. 854, 81st Congress, 1st Session, June 20, 1949) yields a different conclusion. Of basic concern to Congress was the critical need for adequate housing and living facilities around vital defense installations and the possibility of serious consequences to personnel morale arising from undesirable living conditions. To implement the program designed to alleviate this situation, Congress determined that the desired results could best be obtained by the encouragement of the private construction industry to undertake the building projects. Such an undertaking for the Federal Government, it was decided, would be too costly and otherwise unfeasible. Government intervention

was, hence, limited to assisting the private construction industry in obtaining the necessary financing by insuring their indebtednesses through the Federal Housing Administration. No duty, however, was placed on the Government to insure the financial success of the private projects; to the contrary, Congress acknowledged a duty only in developing the defense effort to its fullest potential, and recognized that the morale of defense personnel was an indispensable factor in bringing about the success of the program.

If plaintiffs are to rely on the existence of a statutory duty, it is essential that they show that the statute is designed for their benefit, or for those of a class of which they are members (*Anglo-American and Overseas Corp. vs. United States*, *supra*; *Social Security Admin. Baltimore F.C.U. vs. United States*, *supra*; *Mid-Central Fish Co. vs. United States*, *supra*; and *Routh vs. Quinn*, *supra*). No such showing is made by plaintiffs in this case.

Before a duty can be said to exist, even in the absence of statute, the plaintiff in a negligence action must show that his injury occurred as a result of the invasion by the defendant of a legally protectable interest. Plaintiff has alleged, at best, the deprivation of an expectancy only,⁴ and while a

⁴The cases of *Smith vs. United States*, 113 F. Supp. 131, and *Oman vs. United States*, *supra*, note 4, are not helpful to plaintiffs' position in this connection. Both of these cases involve tangible, existing legal interests, and are addressed to the discretionary function exception to the Tort Claims Act.

definite business expectancy may be considered a protectable interest in a proper case, the Court has already concluded that the Tort Claims Act does not contemplate actions based on interference with business expectations. These fatal defects in the plaintiffs' complaint render the second cause of action likewise subject to a motion to dismiss.

For the reasons above set forth plaintiffs' complaint and each of the causes of action attempted to be set forth therein are, and each of them is, hereby dismissed. Let a judgment in favor of the defendant be entered herein on each of the causes of action attempted to be set forth in plaintiffs' complaint. Defendant will prepare and lodge with the Clerk of this Court all papers and documents necessary for the final disposition of this case.

Dated: February 19, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed February 19, 1957.

To hold that one who assists another in financing the construction of rental facilities owes a concomitant duty to the other (in the absence of statute or contract) to assist him in acquiring tenants would be to create a novel and heretofore unprecedented substantive tort liability for a private citizen as well as the government. This Court declines the invitation to create such a duty.

In the United States District Court for the Northern District of California, Northern Division

Civil No. 7250

BUILDERS CORPORATION OF AMERICA, a
Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for hearing on defendant's motions to dismiss on July 16, 1956, before the Court, Honorable Sherrill Halbert, United States District Judge, presiding. Alvin Landis, Esq., appeared for plaintiffs and Lloyd H. Burke, Esq., United States Attorney, by Marvin D. Morgenstein, Esq., Assistant United States Attorney, appeared for defendant.

Defendant's motions having been submitted for decision upon briefs and oral argument, and the Court, on February 19, 1957, having made and entered its order that the complaint, and each of the causes of action attempted to be set forth in the complaint are dismissed.

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing by their complaint; that

defendant's motion to dismiss Count One of the Complaint for lack of jurisdiction and Count Two of the Complaint for failure to state a claim are granted; that plaintiffs' complaint and each of the causes of action attempted to be set forth therein are dismissed in accordance with Rule 41(b) of the Federal Rules of Civil Procedure; and that costs are awarded to defendant in the amount of \$20.00.

Dated: March 12th, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

Affidavit of Mail attached.

Lodged March 2, 1957.

[Endorsed]: Filed March 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Builders Corporation of America, a corporation, and Herlong Sierra Homes, Inc., a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order entered February 19, 1957, dismissing plaintiffs' complaint and from the final judgment entered in this action on March 12, 1957.

Dated: March 28, 1957.

LANDIS, BRODY & MARTIN,

By /s/ ALVIN LANDIS,
Attorneys for Appellants, Builders Corporation of
America, a Corporation, and Herlong Sierra
Homes, Inc., a Corporation.

[Endorsed]: Filed April 4, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

June 2—Filed complaint, issued summons.

Aug. 12—Filed summons on ret. unex., at the request of the attorney for the plaintiffs.

1956

Feb. 23—Issued alias summons.

Mar. 2—Filed alias summons on ret. ex., 2-27-56.

Apr. 23—Filed stip. ex. time to plead.

May 26—Filed notice of motion to dismiss.

June 6—Filed memo of points & authorities in support of motion to dismiss.

June 18—Ord. case con. to July 16th, 1956, for hearing on motion to dismiss.

July 9—Filed memorandum in opposition to motion to dismiss.

July 16—Hearing; Ord. U. S. have 5 days to file closing memo. Case con. to July 30th, 1956, for further proceedings.

1956

- July 30—Ord. case con. to Sept. 17th, 1956, for further proceedings.
- Sept. 17—Ord. case con. to Oct. 15th, 1956, for further proceedings.
- Oct. 15—Ord. case con. to Nov. 13th, 1957, for further proceedings.
- Nov. 13—Ord. case con. to Dec. 10th, 1956, for further proceedings.
- Dec. 10—Ord. case con. to Feb. 18th, 1957, for further proceedings.

1957

- Feb. 18—Ord. motion to dismiss submitted.
- Feb. 19—Ord. motion to dismiss granted, and that judgment be entered herein in favor of defendant. Filed memorandum & order. Mailed copies.
- Mar. 2—Lodged proposed judgment.
- Mar. 12—Filed judgment in favor of defendant and against plaintiff, with costs in the sum of \$20.00.
- Mar. 12—Entered judgment (Filed March 12th, 1957). Mailed notices to attorneys.
- Apr. 4—Filed notice of appeal. Mailed notice to U. S. Attorney. Filed cost bond on appeal.
- Apr. 9—Filed designation of contents of record on appeal.
- Apr. 24—Made Record on Appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal here as designated:

1. Complaint.
2. Notice of motion to dismiss.
3. Memorandum and order.
4. Judgment.
5. Notice of appeal.
6. Cost bond on appeal.
7. Designation of the contents of the record on appeal.
8. Docket entries.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 24th day of April, 1957.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15533. United States Court of Appeals for the Ninth Circuit. Builders Corporation of America, a Corporation, and Herlong Sierra Homes, Inc., a Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed April 25, 1957.

Docketed April 29, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15533

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant and Appellee.

APPELLANTS' STATEMENT OF POINTS

Appellants, plaintiffs in the above-entitled action, intend to rely upon the appeal of the above-entitled action upon the following points:

1. The complaint sets forth a good cause of action under the Federal Tort Claims Act, Title 28, U. S. Code, Sections 2671, et seq., and Title 28, U. S. Code, Section 1346(b).

2. The District Court erred in sustaining the defendant's motion to dismiss the complaint.

3. The District Court erred in entering judgment in favor of the defendant upon the motion to dismiss filed by the defendant.

Dated: May 6, 1957.

LANDIS, BRODY & MARTIN,
Attorneys for Appellants.

[Endorsed]: Filed May 7, 1957.

No. 15,533

United States Court of Appeals
For the Ninth Circuit

BUILDERS CORPORATION OF AMERICA,
a corporation, and HERLONG SIERRA
HOMES, INC., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR THE APPELLANTS.

LANDIS, BRODY & MARTIN,
926 J Building, Sacramento 14, California,
Attorneys for Appellants.

FILED

AUG 12 1957

PAUL P. O'BRIEN, CLERK

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No. 15,533

**United States Court of Appeals
For the Ninth Circuit**

BUILDERS CORPORATION OF AMERICA,
a corporation, and HERLONG SIERRA
HOMES, INC., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR THE APPELLANTS.

CONTESTED ISSUES.

Appellee's brief is limited to the single argument that the complaint could have been dismissed on jurisdictional grounds in that the appellants sought recovery for damages resulting from "interference with contract rights" and that subsection 2680(h) of the Federal Tort Claims Act (Title 28 U.S.C.) precludes recovery on such a cause of action. Appellee does not argue that the complaint could or should have been dismissed on the ground that the cause of action involved a "discretionary function"—the basis upon which appellee sought to dismiss the action in the District Court. Appellee makes two claims which are not supported by the record: (1) that the complaint

seeks recovery "of lost rental profits," and (2) that the claim is founded on misrepresentation. We shall show in the following discussion why these claims are unfounded.

SUMMARY OF ARGUMENT.

1. The tortious conduct complained of falls within the ambit of tort actions for which recovery may be had under the Federal Tort Claims Act (Title 28 U.S.C. Sections 1346 (b), 2671-2680).

A. The complaint alleges a duty on the part of the Appellee, a breach of such duty, and damages resulting from the breach.

B. The action brought by appellants seeks recovery for damages to property, not lost rental income.

ARGUMENT.

1. **THE TORTIOUS CONDUCT COMPLAINED OF FALLS WITHIN THE AMBIT OF TORT ACTIONS FOR WHICH RECOVERY MAY BE HAD UNDER THE FEDERAL TORT CLAIMS ACT (Title 28 U.S.C. Sections 1346 (b), 2671-2680).**

A. The complaint alleges a duty on the part of the appellee, a breach of such duty, and damages resulting from the breach.

A proper understanding of the nature of the action brought by appellants requires a brief recapitulation of the unusual facts in this case.

Appellants, in constructing the dwelling units, had agreed to reserve the rental units for the exclusive use of military and civilian personnel employed at

the Sierra Ordnance Depot. On January 23, 1954, and again on June 24, 1954, the Department of Defense issued certain directives and orders which were to be implemented by the employees of appellee. The complaint charges that the employees either wilfully or negligently failed to implement these orders. It is true that the complaint alleges certain misrepresentations made by the employees, but as alleged in the complaint, these misrepresentations were offered by the employees as *justification* for not carrying out the orders, and were not alleged as the basis of the action. The basis of appellants' action is the failure or refusal—wilful or negligent—of the appellee to carry out the orders to the damage to the appellants. The principal question is, then, whether the issuance of these orders created a duty on the part of the appellee which required the use of ordinary care in its fulfillment? We hold to the opinion that the answer to this question must be an unequivocal “yes”.

We have alluded to the fact that appellants were required to reserve the units for the exclusive use of the personnel at the Sierra Ordnance Depot. The record shows, additionally, that the depot is located in an isolated and desolate area. The purpose of the orders of January 23 and June 24, 1954, was to accomplish a definite objective—availability of tenants. Unless such orders were implemented the tenants would not be available. We may agree that the Appellee was under no duty to promulgate such orders, but once it had done so, there was a duty to fulfill them properly. At the very least, the issuance of

these orders constituted a voluntary assumption of a duty which, once affirmatively assumed, required the exercise of reasonable care in its discharge. *Valdez v. Taylor Automobile Co.* (1954), 129 C.A. 2d 810, 278 P. 2d 91; *Johnston v. Orlando* (1955), 131 C.A. 2d 705, 281 P. 2d 357; *Hayes v. Oil Co.* (1952), 38 Cal. 2d 375, 384, 240 P. 2d 580. As pointed out in *Valdez*:

“... It is well established that a person may become liable in tort for negligently failing to perform a voluntary assumed undertaking even in the absence of a contract to do so. A person may not be required to perform a service for another but he may undertake to do so—called a voluntary undertaking. In such a case the person undertaking to perform the service is under a duty to exercise due care in performing the voluntarily assumed duty, and a failure to exercise due care is negligence...”

The case at bar is akin to those cited in the principal brief refuting the argument that a discretionary function was involved. In *Hernandez v. United States* (1953), 112 Fed. Supp. 369, the United States *voluntarily assumed* the duty of erecting a road block. Once it assumed this duty, it was obligated to discharge it properly. So, also, in *Somerset v. United States* (1951), 193 Fed. (2d) 631, the United States *voluntarily assumed* the duty of marking the wreck. Here, again, it became charged with the duty of properly discharging that duty. See also the other cases cited under Point 4 in the principal brief. In short, if the complaint were stripped of all allegations except those relevant to the issuance of the orders,

the wilful or negligent failure to implement these orders, and the damages resulting therefrom, a good cause of action would have been alleged under the law of California, as well as under the decisions of the Federal Courts pertaining to the interpretation of the Federal Tort Claims Act.

B. The action brought by appellants seeks recovery for damages to property, not lost rental income.

Appellee argues emphatically that the damages involve loss of rental income. The record discloses that appellants invested \$2,975,000 in the property, of which \$2,375,000 was in mortgage loans and \$600,000 was in capital of appellants expended or obligated by them in the construction of the project. This investment has been, to a large extent, lost. It is the loss of this investment which represents the damages to appellants and which resulted from the wilful or negligent failure of appellee to properly discharge its duty. Reasonable men would have realized that failure to implement the orders of January 23 and June 24, 1954, would result in this loss, as well as losses in rental income.

The allegation in Paragraph II of Count II reads:

“That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, acting within the scope of their respective offices and employment, carelessly and negligently failed and refused to carry out the orders issued as aforesaid, and carelessly and negligently failed and refused to initiate or implement any program to

assure maximum occupancy of the dwelling units constructed by plaintiffs, and carelessly and negligently failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of the Sierra-Ordinance Depot; and carelessly and negligently failed and refused to demolish any of the temporary and substandard housing; and carelessly and negligently failed and refused to issue notices to those specified in said orders to vacate government housing not later than September 1, 1954."

We believe this allegation conclusively establishes that the cause of action is not based on "interference with contract rights".

CONCLUSION.

We renew our contention that the judgment should be reversed and remanded with directions to overrule the motion to dismiss and to require the defendant to plead.

Dated, Sacramento, California,
August 9, 1957.

Respectfully submitted,

LANDIS, BRODY & MARTIN,
Attorneys for Appellants.

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15533

**BUILDERS CORPORATION OF AMERICA, a Corporation,
and HERLONG SIERRA HOMES, INC., a Corporation,
APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the United States District Court for
the Northern District of California
Northern Division**

BRIEF FOR APPELLEE

GEORGE COCHRAN DOUB,
Assistant Attorney General,

LLOYD H. BURKE,
United States Attorney,

**PAUL A. SWEENEY,
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FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15533

**BUILDERS CORPORATION OF AMERICA, a Corporation,
and HERLONG SIERRA HOMES, INC., a Corporation,
APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the United States District Court for
the Northern District of California
Northern Division**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act in the United States District Court for the Northern District of California to recover damages for alleged loss of rental income from dwelling units constructed and owned by appellants adjacent to the Sierra Ordnance Depot in Lassen County, California. The United States moved to dismiss the complaint for failure to state a claim, and for want of jurisdiction under the Tort Claims Act. This appeal

is from an order of the district court dismissing the complaint on the government's motion.

The factual allegations of the complaint may be summarized as follows:

The United States owns and operates the Sierra Ordnance Depot located in an isolated part of Lassen County, California (R. 3-4). When housing facilities for military and civilian personnel stationed at the depot were found to be inadequate in July 1950 (R. 8-9), the "Department of Defense entered into negotiations with the Federal Housing Administration (FHA) and the Housing and Home Finance Agency (HHFA) to obtain [private] construction of four hundred fifty-six (456) dwelling units" to be used to house personnel at the depot (R. 9-11). In October, 1951, the FHA pursuant to Title VIII of the National Housing Act (12 U.S.C. 1748b), upon certification by the Department of the Army of a need for housing facilities in the depot area, agreed to insure mortgage loans on 125 dwelling units to be constructed and operated by appellant Herlong Sierra Homes, Inc. for its own account (R. 11-13). These units were completed by Herlong and ready for occupancy in January 1954 (R. 13). The FHA also undertook to insure mortgage loans on 150 dwelling units constructed by appellant Builders Corporation of America for its own account, which were ready for occupancy in August 1954 (R. 14-15). The complaint further alleges that in January 1954 the Commanding General of the Sixth Army directed the depot commander to take certain affirmative steps to

ensure occupancy of appellants' housing by base personnel (R. 15-16).

As grounds for relief, Count I of the complaint asserts (1) that the depot commander and other named subordinate officers "with the intention of damaging plaintiffs, deliberately, intentionally, and wilfully failed and refused to carry out the orders issued" by the commanding general to ensure occupancy of the housing (R. 18); and (2) that the named officers, for the purpose of preventing occupancy of appellants' housing by depot personnel, deliberately misrepresented the quality of the construction of the housing to the commanding general, the FHA and the HHFA, and to the military and civilian personnel stationed at the depot, thereby preventing occupancy of the housing by depot personnel (R. 19-21).

In Count II of the complaint, appellants asserted, alternatively, (1) that the named officers negligently failed to carry out the commanding general's orders to take steps to ensure full occupancy of appellants' housing (R. 22-23); and (2) that the named officers negligently misrepresented the quality of construction of the housing to the commanding general, the FHA and HHFA, and to the depot personnel, thereby preventing occupancy of the housing (R. 23-25).

The district court, after hearing argument on the government's motion to dismiss, dismissed Count I of the complaint for lack of jurisdiction under the Federal Tort Claims Act, and Count II for failure to state a claim on which relief could be granted (R. 36-37).

STATUTE INVOLVED

The Federal Tort Claims Act (Title 28, U.S.C.) insofar as pertinent, provides:

Section 1346

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

SUMARY OF ARGUMENT

I

A. The Federal Tort Claims Act does not extend to recovery based on the tort of interference with contractual relations. The present complaint seeks

recovery of lost rental profits based on two counts of alleged wilful or negligent interference by government officers with appellants' prospective tenancies. Under both California and general law, interference with a prospective economic benefit or advantage is merely an element of the tort of interference with contractual relations. Hence, Count I of the complaint for wilful interference is barred under the Tort Claims Act. Insofar as Count II of the complaint (for negligence) states a claim at all, it must also be grounded on interference with prospective economic advantage, and is therefore barred under the Tort Claims Act.

B. The complaint, in alleging wilful or negligent misrepresentations on the part of government officers as to the suitability of appellants' dwelling units, presents a claim founded on misrepresentation, a tort which is expressly excluded from the waiver of immunity in the Tort Claims Act. This Court has held in *Clark v. United States*, 218 F. 2d 446 that the exclusion for misrepresentation applies both to negligent and wilful misrepresentation. No claim can be founded on the complaint's other allegations of failure by government officers to take affirmative action to ensure occupancy of appellants' property, since no duty on the part of the United States to act is alleged.

It follows that the entire complaint, to the extent that it states a claim, is grounded on misrepresentation and could have been dismissed for lack of jurisdiction on this ground.

II

The district court correctly dismissed Count II of the complaint, based on negligence, for failure to state a claim upon which relief could be granted. This count, although alleging negligent action and inaction on the part of the government officers and resulting damage to appellants, fails to allege any duty on the part of the United States to appellants, based on law or contract, to act or refrain from action in connection with the lease of appellants' housing. It is of course settled that no recovery can be had for negligence in the absence of a duty to the plaintiff.

ARGUMENT

The Federal Tort Claims Act (*supra*, p. 4) authorizes suit against the United States for the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." The waiver of sovereign immunity for tort liability is specifically conditioned, however, by exclusion of the following types of claims (28 U.S.C. 2680(h), *supra*, p. 4) :

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

We show in the following pages that the court below correctly dismissed Count I of the complaint on the ground that it was based on the excluded tort of "interference with contract rights", and that it prop-

erly dismissed Count II because of appellants' failure to allege a breach of a duty owed to them by the Government. We shall also show that the entire complaint could properly have been dismissed on jurisdictional grounds.

I

The Entire Complaint Could Have Been Dismissed On Jurisdictional Grounds.

A. Since Both Counts of the Complaint Sought Recovery for "Breach of Contract Rights", the District Court had no Jurisdiction to Entertain Either Count Under the Tort Claims Act.

1. Count I of the complaint (R. 18-21) claimed in substance that government officers deliberately and intentionally misrepresented the structural conditions and general suitability of appellants' dwelling units to their superiors, as well as to depot personnel who were potential occupants of the facilities, thereby persuading personnel not to lease the facilities with resulting loss to appellants. In addition, Count I alleged that the same officers deliberately failed to take certain affirmative steps which would ensure occupancy by depot personnel. These allegations, as the court below recognized (R. 29-30), insofar as they stated a claim at all, amounted to a claim of interference with contractual relations under California law. Under the law of that State, which is controlling here,¹ the tort of interference with con-

¹ State law (in this case the law of California, the State in which the alleged negligent or wrongful acts and the damage occurred) governs the substantive right of recovery under the Tort Claims Act, 28 U.S.C. 1346 (b) ; cf. *Massachusetts Bonding Co. v. United States*, 352 U.S. 128.

tractual relations encompasses interference with prospective as well as existing business relationships. *Masoni v. Board of Trade*, 119 Cal. App. 2d 738, 260 P. 2d 205; *Campbell v. Rayburn*, 129 Cal. App. 2d 232, 276 P. 2d 671; *Guillary v. Godfrey*, 134 Cal. App. 2d 628, 286 P. 2d 474.

As we have noted, the gravamen of Count I of the complaint is that appellants were intentionally and wrongfully deprived of rental profits which they would have obtained from prospective tenants, had not those tenants been dissuaded from leasing appellants' properties as a result of action or inaction by government officers. Since the tort of interference with contractual relations under California law "is not limited to inducing breach of an existing contract or other wrongful conduct but comprises also unjustifiably inducing a third person not to enter into or continue a business relation with another," *Masoni v. Board of Trade, supra*, at p. 741, the Tort Claims Act provides no jurisdiction over Count I.

Even apart from California law, it is evident that Congress did not intend to permit suits against the United States for damages arising from what Dean Prosser has termed the tort of "interference with prospective advantage" (Prosser, *Torts*, 2d Ed., pp. 745-748). As the court below observed (R. 29):

It would seem to be quite illogical to conclude that Congress intended to exclude one tort from the operation of the Act, and, at the same time, waive the Government's immunity from actions sounding in a substantially identical tort; the distinction between the two being one of degree,

only, in the elements necessary to establish liability.

This conclusion is strengthened by the fact that interferences with merely prospective rights are held actionable only by analogy to interference with existing contracts, and a defendant is accorded a much more extensive privilege to interfere with a mere expectation of benefit than with an existing contract right. Prosser, *Torts*, 2d Ed., pp. 745-748. It is highly unlikely therefore that Congress would have intended to exclude suits based on interference with existing contracts but to allow recovery based on mere expectation of benefit.²

2. Count II of the complaint, which restates the allegations of Count I but characterizes the conduct in each instance as negligent rather than wilful or deliberate, is jurisdictionally defective for the same reasons.

Although "interference with contractual relations" is primarily an intentional tort, in certain cases damages can be recovered for negligent rather than an intentional interference with contract rights. Prosser, *Torts*, 2d Ed., pp. 732-735. It follows that insofar as Count II states a claim at all, it is based

² Appellants' argument (Br. 22-23) that their claim was based on something more than interference with prospective contract relations breaks down under analysis. The damage alleged in their complaint is ascribed solely to the failure of depot personnel to lease their property; from this failure, all of the allegedly consequent damages flowed. The sole reason alleged as to why appellants' property was not occupied is the wilful or negligent action and inaction on the part of government officers in interfering with, or failing to further, the prospective tenancies.

on the tort of interference with contract rights which is barred under the Tort Claims Act.

Furthermore, courts have refused in many cases to allow any recovery at all for negligent interference with contractual relations. Prosser, *supra*, p. 732. Application of such a rule here would mean that Count II fails to state a claim upon which relief could be granted. Either way, there can be no recovery under Count II. See Pt. II, *infra*.

It follows that Count II could have been dismissed on the ground that it presented a claim for interference with contractual relations, a claim on which the United States has not consented to suit, as well as on the basis actually chosen by the district court, that it failed to state a claim upon which relief could be granted.³

³ It appears clear that the first count could also have been dismissed for failure to state a claim. While the complaint alleges an interference with prospective economic advantage which is a *prima facie* basis for recovery, it is well established that an employer, acting in good faith to protect his employees' interests, is privileged to dissuade them from entering contractual arrangements, and that any damage caused to third parties is *damnum absque iniuria*. Prosser, *Torts*, 2d Ed., p. 736. Since Count I, as we read it, does not allege malice or bad faith on the part of the depot officers but only a deliberate intent to prevent occupancy of appellants' property, the advice given to the depot employees was privileged and could not give rise to a right of action against the United States.

It also seems clear that the appellants could not complain of the depot officers' allegedly deliberate failure to take affirmative steps to ensure occupancy of appellants' housing, since the officers were under no duty, by contract or otherwise, to further appellants' enterprises. See Pt. II, *infra*, pp. 11-16.

B. *Misrepresentation by Government Officers as to the Suitability of Appellants' Housing for Occupancy, Whether Wilful or Negligent, is an Essential Allegation of Both Counts of the Complaint. Hence, the Complaint was Barred by the Tort Claims Act's Express Prohibition Against Recovery for Misrepresentation.*

The gist of both Counts I and II of the complaint was the claim that the depot officers had injured appellants by wilfully or negligently misrepresenting the condition of appellants' dwelling units to depot personnel, thus persuading them not to occupy the units.⁴

The Tort Claims Act (*supra*, p. 4) expressly excludes from its coverage the torts of deceit (wilful or fraudulent misrepresentation) and misrepresentation. This Court in *Clark v. United States*, 218 F. 2d 446, has held that the exception applies to recovery for any wilful or negligent misrepresentation. See, for the same holding, *Jones v. United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 967; *Miller Harness v. United States*, 241 F. 2d 781 (C.A. 2); *National Mfg. Co. v. United States*, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967. Since both counts of the complaint are founded on a claim that appellants were damaged by misrepresentations, either wilful or negligent, both counts

⁴ It is true that both counts also allege a failure on the part of the depot officers to take affirmative steps to ensure occupancy of appellants' housing. Since, however, the complaint does not evidence any duty on the part of these officers to take affirmative steps to further appellants' business, the complaint must stand or fall on its allegations of misrepresentation. (See, *supra*, p. 10 and Pt. II, *infra*, pp. 11-16.)

were also subject to dismissal on this ground. *Anglo-American and Overseas Corp. v. United States*, 144 F. Supp. 635, 637 (S.D.N.Y.).

II

Count II of the Complaint Was Properly Dismissed For Failure To State A Claim Upon Which Relief Could Be Granted.

The district court dismissed the second count of the complaint on the ground that the complaint does not allege the breach of a duty owed to appellants, stating *inter alia*:

In order to recover damages on their second cause of action, based on negligence, it is essential that plaintiffs allege and prove that defendant owed them a duty to conform to a standard of conduct which would prevent the kind of injury which plaintiffs allegedly suffered. This is the rule in California (*Routh vs. Quinn*, 20 Cal. 2d 488), and is likewise applicable to actions based on negligence under the Federal Tort Claims Act * * *

* ∴ * *

Plaintiffs' contentions in this regard are based essentially on a theory that Congress, by enacting laws designed to encourage the construction by private businesses of dwelling facilities near military installations, intended to create a duty on the part of the commanding officers of such installations to provide the owners of such housing facilities with tenants so that their investment would be a profitable one. However, an analysis of the statutory provisions (12 U.S.C.A., §§ 1748, et seq.), and their legislative history

(House Report No. 854, 81st Congress, 1st Session, June 20, 1949) yields a different conclusion. * * *

It is of course a familiar tort principle that in order to recover for negligence a plaintiff must show a duty of due care owed to him, and a breach of that duty by the defendant. Prosser, *Torts*, 2d Ed., pp. 167-168; *The Dalles City v. River Terminal Co.*, 226 F. 2d 109 (C.A. 9). The complaint here at most alleges a breach of a duty owed by the depot officers to their superiors. No contract or agreement placing a duty on the Government to supply appellants with tenants is alleged. On their face, the statutes authorizing insurance of mortgages on privately owned housing upon certification by the Secretary of the Army of a need for such housing (12 U.S.C. 1748b; 12 U.S.C. 1750b) do not obligate any government agency or officer to assist or protect the business interests of a private builder or lessor beyond the express provisions for mortgage insurance. As the allegations of the complaint indicate (R. 11-16), the only contract or understanding between appellants and the Government was the agreement of the FHA to insure private mortgages on construction loans obtained by appellants, and no other commitments as to occupancy of appellants' housing or as to the profits to be derived by appellants were made by the Government.⁵ Thus, while appellants undoubtedly an-

⁵ The House Committee Report on the bill adding Title VIII to the National Housing Act (H. Rep. No. 854, 81st Cong., 1st Sess., p. 4) states:

Normally the housing units needed at each [military]

ticipated that their property would be profitably occupied by depot personnel, the United States was under no duty to take affirmative steps to ensure that this would happen and equally had no duty to avoid any lawful action which might prevent its happening. See, *e.g.*, *Woolridge Manufacturing Co. v. United States*, 235 F. 2d 513 (C.A.D.C.); *Mid-Central Fish Co. v. United States*, 112 F. Supp. 792 (W.D. Mo.), affirmed, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967; *Social Security Administration Baltimore F.C.U. v. United States*, 138 F. Supp. 639 (D. Md.); *Anglo-American and Overseas Corp. v. United States*, 144 F. Supp. 635 (S.D.N.Y.). As the district court recognized (R. 33-34):

* * * Of basic concern to Congress was the critical need for adequate housing and living facilities around vital defense installations and the possibility of serious consequences to per-

installation would be supplied through the construction of public quarters by the military forces. However, meeting this present need in its entirety through the use of public funds would require a tremendous direct expenditure by the Federal Government. It is therefore extremely important that private builders be encouraged to construct as much of this housing as possible.

The bill is designed to encourage them to construct such housing. Where housing is constructed with mortgage insurance under the bill, no cost to the Government would be involved unless, through deactivation or curtailment of military installations or other causes there are losses in excess of the premium and other payments by the mortgagee to the insurance fund. In any event, such losses would not approach the cost of construction by the Federal Government.

sonnel morale arising from undesirable living conditions. To implement the program designed to alleviate this situation, Congress determined that the desired results could best be obtained by the encouragement of the private construction industry to undertake the building projects. Such an undertaking for the Federal Government, it was decided, would be too costly and otherwise unfeasible. Government intervention was, hence, limited to assisting the private construction industry in obtaining the necessary financing by insuring their indebtednesses through the Federal Housing Administration. No duty, however, was placed on the Government to insure the financial success of the private projects; to the contrary, Congress acknowledged a duty only in developing the defense effort to its fullest potential, and recognized that the morale of defense personnel was an indispensable factor in bringing about the success of the program.

By the same token, purported negligence of depot officers in failing to carry out orders, allegedly received from their superiors, to ensure that appellants obtained tenants for their housing, constituted a breach of a duty, if any, only to those superiors or to the employees themselves, not to appellants. Appellants can recover for the officers' purported negligence only by showing a breach of some duty which the officers owed to them. However, a duty to a private person on the part of a government officer in his official capacity must arise either from law or express agreement. We have seen and the complaint demonstrates that the Government at no time obligated itself to ensure the success of appellants' real estate

venture. Under the Tort Claims Act, a duty on the part of an officer for which the Government could be held responsible would have to flow from some government obligation, and none is alleged here.

A failure by government personnel to exercise due care with respect to a duty owed one person does not give a third party to whom no duty is owed the right to recover. "Negligence in the air, so to speak will not do." Pollock, *Law of Torts*, 13th Ed., p. 468; see Prosser, *Torts*, 2d Ed., pp. 166-168.

Thus, although Count II of the complaint was also subject to dismissal on jurisdictional grounds, the district court properly dismissed the count for failure to state a claim.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be affirmed.

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No. 15,533

United States Court of Appeals
For the Ninth Circuit

BUILDERS CORPORATION OF AMERICA,
a corporation, and HERLONG SIERRA
HOMES, INC., a corporation,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLANTS.

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FILED

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HOMES, INC., a corporation,

Appellants,

VS.

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Appellee.

BRIEF FOR THE APPELLANTS.

I.

JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Northern Division (Cl. Tr., p. 36). Notice of Appeal to this Honorable Court was timely filed (Cl. Tr., p. 37). The causes of action were for damages under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671-2680. Jurisdiction is conferred on the District Court under 28 U.S.C. Section 1346(b). Jurisdiction is conferred on this Court under 28 U.S.C. Sections 1291 and 1294.

II.

STATEMENT OF THE FACTS.

Appellants filed their action for damages against the United States under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) and Sections 2671-80 (Cl. Tr., pp. 3-25). Appellee filed its motion to dismiss (Cl. Tr., pp. 25-26), which was sustained by the District Court (Cl. Tr., pp. 26-35), and thereafter the District Court entered judgment for the defendant (Cl. Tr., pp. 36-37).

The complaint is in two counts. The allegations of facts are substantially the same in both counts, except that in count one, the defendant is charged with wilful conduct, whereas in count two, the defendant is charged with negligent conduct. The complaint paints the following picture:

The United States owns, operates and maintains a military installation known as the Sierra Ordnance Depot. This Depot is a Federal enclave located in Lassen County, California, in a desolate and isolated area. The nearest points of urban development are Susanville, California, approximately forty miles northwest of the Depot, and Reno, Nevada, approximately fifty-six miles southeast of the Depot. Military and civilian personnel employed at the Depot by the United States are quartered on or near the Depot (Cl. Tr., p. 4). The complaint names certain individuals who were duly authorized agents and employees of the defendant and alleges that the actions chargeable to them were within the scope of their respective offices and employment (Cl. Tr., pp. 5-6).

A critical housing shortage prevailed at the Depot which impeded or threatened to impede the effective operation of the Depot. Because of this housing shortage, negotiations were carried on between the Department of Defense and the Federal Housing Administration and the Housing and Home Finance Agency (both Federal agencies) to obtain construction of four hundred fifty-six (456) dwelling units to adequately house civilian and military personnel employed at the Depot. These negotiations were carried on pursuant to the authority conferred upon these Federal Agencies under the National Housing Act approved June 27, 1934 (48 Stat. 1246, 12 U.S.C. 1702) and under the Act of August 8, 1949 (63 Stat. 570), which required private enterprise to undertake the investment risks in such projects. The negotiations culminated in the issuance on October 24, 1951, by the Secretary of the Army acting in pursuance of his authority, of a certification to the Federal Housing Administration that one hundred thirteen (113) family units in multiple family structures and twelve (12) single family structures were necessary to provide adequate rental housing for civilian and military personnel assigned to duty at the Sierra Ordnance Depot; that such military installation was deemed to be a permanent part of the Department of the Army and that there was no present intention to substantially curtail activities at such installations (Cl. Tr. pp. 6-11).

At the request of the Department of the Army, the Housing and Home Finance Agency, with the approval of the Department of the Army, programmed an addi-

tional one hundred fifty (150) family dwelling units for rental housing for civilian and military personnel of the Sierra Ordnance Depot (Cl. Tr., p. 12). Thereafter, pursuant to statutory authority, the Federal Housing Administration agreed to insure a mortgage on the one hundred twenty-five (125) dwelling units in the amount of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars (\$1,113,700.00). By reason of the representations made by the Department of the Army and the commitments of the Federal Housing Administration, the appellant Herlong Sierra Homes, Inc., filed its application, received approval, and thereafter undertook to construct the one hundred twenty-five (125) dwelling units in accordance with specifications, plans and drawings issued and approved by the Department of the Army and the Federal Housing Administration and agreed to reserve the completed dwelling units for rent to civilian and military personnel of the Sierra Ordnance Depot. Subsequently, appellant Herlong Sierra Homes, Inc., fully complied with all of the conditions and requirements for the construction of the one hundred twenty-five (125) dwelling units and all of said dwelling units were completed and ready for occupancy in January, 1954 (Cl. Tr., pp. 12-14).

Appellant, Builders Corporation of America, by reason of the representations made by the Department of Defense and the commitment of the Federal Housing Administration to insure a mortgage of One Million Two Hundred Sixty One Thousand Three Hundred and no/100 Dollars (\$1,261,300.00) for the dwelling

units programmed by the Housing and Home Finance Agency, received approval and thereafter undertook to construct the one hundred fifty (150) dwelling units in accordance with plans, specifications and drawings issued and approved by the Department of Defense and the Federal Housing Administration and in accordance with the provisions of the National Housing Act as amended and the rules and regulations promulgated thereunder (Cl. Tr., p. 14). The total investment in the properties by appellants amounted to Two Million Six Hundred Seventy-five Thousand and no/100 Dollars (\$2,675,000.00), composed of the mortgage loans amounting to Two Million Three Hundred Seventy-five Thousand and no/100 Dollars (\$2,375,000.00) and Six Hundred Thousand Dollars (\$600,000.00) expended or obligated by appellants for the construction of the dwelling units (Cl. Tr., p. 15). Upon completion of the project, or even before, directives and orders previously determined upon were issued by the Department of Defense to initiate and develop a coordinated and aggressive program to assure maximum occupancy of the two hundred seventy-five (275) dwelling units constructed by the appellants. Among the orders and directives issued by the Department of Defense to the Depot employees in charge were the following:

(a) An income limitation with a sliding scale for dependents was to be established above which military and civilian personnel would not be permitted to occupy the substandard existing government housing.

(b) Notices were to be served upon all tenants of government housing whose incomes were above the salary limit directing them to vacate their quarters not later than September 1, 1954.

(c) Notices were to be served on tenants of government housing who were not employees of the Department of the Army, but rendering service to the Depot that, unless post housing was guaranteed to these tenants under a contract or operating agreement, they were to vacate their government housing not later than September 1, 1954.

(d) One hundred twenty-five (125) substandard family quarters were to be selected for demolition (Cl. Tr., pp. 15-17).

Appellants then charge that the named employees of the defendant wilfully refused to carry out these orders and attempted to and did induce, persuade, coerce and entice military and civilian personnel from moving into the dwelling units constructed by appellants; that said employees, acting within the scope of their authority and employment, by threats and intimidation and abuse of the authority vested in them by virtue of their respective positions, sought to and did preclude and prevent the military and civilian personnel from moving into said dwelling units constructed by appellants, and that said employees and each of them acting within the scope of their authority and employment attempted to and did induce and incite the military and civilian personnel to interfere

with the occupancy of the dwelling units and of the rights and privileges granted by the United States to the appellants; that by reason of the wrongful acts of the defendant, its employees and agents, appellants were damaged in the sum of Three Million Four Hundred Seventy-five Thousand and no/100 Dollars (\$3,475,000.00) (Cl. Tr., pp. 20-21).

Count two alleges that the named employees, agents of the defendant, acting within the scope of their respective offices and employment, carelessly and negligently failed and refused to carry out the orders issued by the Department of Defense, carelessly and negligently failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by appellants, carelessly and negligently failed and refused to establish income limits for those who were to occupy the houses owned and operated by the defendant, carelessly and negligently failed and refused to demolish any of the temporary and substandard housing and carelessly and negligently failed and refused to issue notices to those specified in said orders to vacate the said housing not later than September 1, 1954 (Cl. Tr., pp. 22-23); that by reason of the negligence and careless acts of the defendant, its employees and agents, appellants were damaged in the sum of Three Million Four Hundred Seventy-five Thousand and no/100 Dollars (\$3,475,000.00) and sought judgment therefor. (Cl. Tr., p. 25.)

Thereafter the defendant filed its motion to dismiss upon the following grounds:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action because the Court lacks jurisdiction over the subject matter of the action pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671, et seq. (Cl. Tr., pp. 25-26.)

On February 19, 1957, the District Court entered its Memorandum and Order sustaining the motion to dismiss (Cl. Tr., pp. 26-35). On March 2, 1957, the Court entered its judgment for the defendant.

III.

THE ISSUE INVOLVED.

The issue involved in this appeal is whether either count one or count two of the complaint, or both, sets forth a justiciable cause of action against the United States under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2671-2680.

IV.

SUMMARY OF ARGUMENT.

1. The motion to dismiss admits all facts well pleaded and all facts that reasonably could be inferred from the facts alleged.

2. The test of governmental liability under the Federal Tort Claims Act, absent a cause of action based on the exceptions enumerated in 28 U.S.C. Section 2680, is whether, under state law, there would be liability if a private person had committed the wrong complained of.

3. The complaint sets forth a justiciable cause of action under the law of the State of California.

4. The tortious conduct chargeable to the defendant did not involve a discretionary function within the meaning of the exception set forth in 28 U.S.C. Section 2680(a).

5. The wrongful conduct chargeable to the defendant was not a tort which could be classified as "an interference with contract rights."

V.

ARGUMENT.

1. **THE MOTION TO DISMISS ADMITS ALL FACTS WELL PLEADED AND ALL FACTS THAT REASONABLY COULD BE INFERRED FROM THE FACTS ALLEGED.**

The defendant filed its motion to dismiss on jurisdictional grounds under authority of Rule 12(b) (1), Federal Rules of Civil Procedure, 28 U.S.C. Such a motion admits all facts well pleaded and all facts that reasonably could be inferred from the facts alleged.

Gibbs v. Buck (1938), 307 U.S. 66, 59 S.Ct. 725, 63 L.Ed. 1111;

Amos v. Prom (1953), 115 Fed. Supp. 127.

2. THE TEST OF GOVERNMENTAL LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT, ABSENT A CAUSE OF ACTION BASED ON THE EXCEPTIONS ENUMERATED IN 28 U.S.C. SECTION 2680, IS WHETHER, UNDER STATE LAW, THERE WOULD BE LIABILITY IF A PRIVATE PERSON HAD COMMITTED THE WRONG COMPLAINED OF.

The Federal Tort Claims Act makes the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. Sections 2671-2680; *Rayonier v. United States* (1956), 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed. (2d) 354; *Indian Towing Company v. United States* (1955), 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48.

The Tort Claims Act waives the defense of sovereign immunity to claims against the United States arising in tort. It makes the United States liable "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting in the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

In *Rayonier*, the Supreme Court had before it the question of whether the United States were liable under the Federal Tort Claims Act for damages caused by carelessness of the Forest Service in fighting forest fires. Referring to the language of the Act, the Court states (p. 358):

"These provisions, given their plain natural meaning, make the United States liable to peti-

tioners for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaint, Washington law would impose liability on private persons or corporations under similar circumstances."

In *Maryland v. United States*, 165 Fed. (2d) 869, the Fourth Circuit, speaking through Justice Parker, states (p. 871):

"... Congress was creating a liability not theretofore existing on the part of the government. To have defined all tort rules under which liability could be established would have been an almost impossible undertaking, but standards of liability were necessary and Congress was compelled, as a practical matter, to adopt the principles of local law in defining them . . . "

The fact that the tortious conduct chargeable to the employees of the defendant was performed in a governmental capacity does not affect the question of liability even if there was no identical private activity to which such conduct could pertain. This was clearly enunciated in *Indian Towing Company*. Here the cause of action was based on the alleged negligence of the Coast Guard in the operation and maintenance of a lighthouse. In disposing of the Government's argument that the act was a peculiarly governmental activity, the opinion states (p. 67):

"... we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance . . . the presence or absence of identical private activity."

The basis of liability was set forth in the following language (p. 69):

“The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a lighthouse on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.”

It is thus clear that if the conduct chargeable to the defendant is actionable under California law, recovery may be had under the Federal Tort Claims Act.

3. THE COMPLAINT SETS FORTH A JUSTICIABLE CAUSE OF ACTION UNDER THE LAW OF THE STATE OF CALIFORNIA.

The complaint alleges the substandard living conditions of the personnel quartered at the Sierra Ordnance Depot; the urgent need for improved living accommodations; the intense activity of the Department of Defense to obtain private enterprise to construct adequate quarters in the desolate and isolated area in which the Depot was located; and an investment of more than three million dollars in the project by the appellants. The complaint points out that unless government personnel were made available as tenants, this large investment would be lost. To forestall such

inequitable result, the Department of Defense initiated a program and issued its orders and directives to implement the program.

Failure on the part of the government employees to carry out the orders and directives could result in grievous and extensive losses to appellants.¹ The complaint charges that the employees named therein wilfully or negligently failed to carry out the orders and directives resulting in damages to the appellants.

It is conceded that the factual situation is perhaps novel. But, as the Supreme Court states in *Rayonier*, at page 319:

“It may be that it is ‘novel and unprecedented’ to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability . . .”

The standard of care prescribed in situations which may not come within the familiar classification of tort actions is set forth in Section 1708, Civil Code of the State of California. This section provides:

“Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.”

The conduct chargeable to the defendant is certainly of a kind from which reasonable men would realize

¹Since the initiation of this action and during the pendency thereof, the 150 additional units have been lost through action for possession under the mortgage.

that injury to the appellant would occur. Moreover, the action of the government in setting up a program and issuing its orders and directives to implement the program, *even though voluntary on its part*, created a right on the part of the appellant and a correlative duty on the part of the government to properly carry out the program and to properly comply with the orders and directives issued. In *Perry v. D. J. & T. Sullivan Co.* (1933), 219 Cal. 386, 26 Pac. (2d) 485, the Court holds that:

“One who undertakes to do an act or perform a service for another is bound to use reasonable care and skill in the performance thereof and is liable for his failure in this respect, although his undertaking was purely voluntary and he was not under any obligation to do such act or perform such service . . .” (p. 390).

In *Dahms v. General Elevator Co.* (1932), 214 Cal. 733, 7 Pac. (2d) 1013, recovery was allowed for injuries sustained by an elevator operator as a result of careless maintenance of the elevator by the defendant. The defendant's responsibility for maintenance derived from a contract between the defendant and the owner of the property. The defendant claimed it owed no duty to the plaintiff, the elevator operator, but this contention was disposed of by the Court in holding that section 1708 of the Civil Code, at least in part, established a duty on the part of the defendant to the plaintiff. See also *Jaehne v. Pac. Tel. and Tel. Co.* (1951), 105 Cal. App. (2d) 683, 234 Pac. (2d) 165, *McCall v. Pacific Mail S.S. Co.* (1898), 123 Cal. 142, 55 Pac. 706.

4. **THE TORTIOUS CONDUCT CHARGEABLE TO THE DEFENDANT DID NOT INVOLVE A DISCRETIONARY FUNCTION WITHIN THE MEANING OF THE EXCEPTION SET FORTH IN 28 U.S.C. SECTION 2680(a).**

The Government's principal contention was that there was no liability by reason of the exception in 28 U.S.C. Section 2680(a), which provides that the Federal Tort Claims Act shall not apply to

“(a) any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the Government, whether or not the discretion involved be abused.”

Appellants contend that the action and conduct of the defendant did not involve an exercise of discretion. The complaint specifically points out that the bases of the complaint for which the damages are claimed were not within the policy making discretion of the employees but were either wilful or negligent acts directly contrary to orders properly issued to implement a plan which had been adopted by the government and that by reason of the wilful or negligent failure of these employees to carry out these orders the appellants suffered damages.

Perhaps the best discussion on the meaning of the term “discretion” as used in the Federal Tort Claims Act is found in *Smith v. United States* (1953), 113 Fed. Supp. 131. That case involved an action under the Federal Tort Claims Act for damages to plaintiff's business resulting from alleged negligent construction and maintenance of New Castle Air Base. The com-

plaint alleged that the negligent and wrongful activities and omissions of the Government consisted in the manner in which the Air Base was constructed and maintained. It charged that the defendant changed the grade and contour of the upstream land so as to increase the drainage of surface waters with the result the creek banks and much sand and gravel were washed downstream, eventually filling plaintiff's reservoir which was used in his business. The Government filed a motion to dismiss on the ground that the actions in the construction and maintenance of the Air Base came within the discretionary clause of the Federal Tort Claims Act. In distinguishing between that which is discretionary and that which is not discretionary, the Court gives the key test in the following language:

“ . . . it seems the Government agency or employees must have freedom to decide whether to perform the pivotal act from which the alleged tortious consequences arise or not so to act. *When a statute, ordinance, or other proper authority imposes a duty upon the Government agency to act in a prescribed manner, no discretion is involved in assuming that duty, and the details of discharging it are impliedly non-discretionary.* Conversely, when there is no obligation to act in the sphere of jurisdiction assigned to the governmental agency, the election not to act, of which the plaintiff complains is discretionary . . . ” (Italics supplied.)

The Court further points out (page 136):

“ . . . there is a wide area of governmental activities following and attendant upon, in more or less degree, the exercise of official discretion for which

the United States has shed its cloak of immunity to suit by the Federal Tort Claims Act . . .”

In *Oman v. United States* (1949), 179 Fed. Rep. (2d) 738, an action was brought under the Federal Tort Claims Act charging that government employees of the Grazing Service who were in charge of grazing activities on the public domain in the San Rafael District, Utah, had wrongfully aided, allowed, and encouraged other livestock operators to utilize the public domain upon which plaintiff had been granted exclusive grazing privileges.

Plaintiff further alleged that his predecessors in interest had been granted exclusive grazing privileges on the public domain and when plaintiff notified employees of the grazing service of his acquisition of the leaseholds of his predecessors in interest, said employees represented that they would cancel the exclusive privileges granted to plaintiff's predecessors and would issue such privileges to the plaintiff. Plaintiff alleged that, contrary to these representations, said employees failed and refused to cancel the grazing privileges of plaintiff's predecessors in interest and negligently, wrongfully, and with the intent to injure plaintiff, permitted, aided, and directed others to use said lands.

The District Court dismissed on the ground that the complaint failed to state a cause of action. Reversing the action of the District Court, the Circuit Court states (page 740):

“Eliminating the claim arising out of misrepresentation, the tortious acts, if any, bringing this

case within the jurisdiction of the federal courts, consist of aiding and encouraging other livestock owners to utilize the grazing lands adjacent to the lands owned in fee, and of aiding and directing similar acts, with intent to injure and destroy plaintiff's exclusive grazing privileges, coupled with the refusal to cancel plaintiff's predecessor's permits, on the grazing lands adjacent to the leaseholds.

"Such acts are not within the exception to the Tort Claims Act based upon discretionary functions. *No government employee is granted the discretion whether he shall induce or incite third persons to interfere with exclusive rights or privileges granted by the United States.* It may be that certain of defendant's employees would have had the discretionary authority to take steps to revoke or cancel plaintiffs' exclusive grazing privileges, but no such steps appear to have been taken in this case . . ." (Italics supplied.)

The Court further states at page 741:

"The remaining question is whether the acts alleged constituted a redressible wrong for which the United States, if a private citizen, would be liable. *All persons who advise, instigate, aid, encourage or direct a wrongful act are as liable as if they had performed the act themselves.*" (Italics supplied.)

In *Hernandez v. United States* (1953), 112 Fed. Supp. 369, employees of the United States erected a road block on a road exclusively under the control of the United States. The plaintiff while driving a motor-

cycle was injured when riding into the road block and it was claimed that the employees of the United States were negligent in failing to place proper warning signals. The Government contended that the placing of a road block and warning signals were discretionary functions. In denying the motion to dismiss, the Court states (page 371):

“... It may be assumed *arguendo* that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead ...”

In *Somerset v. United States* (1951), 193 Fed. (2d) 631, the plaintiff sought to recover for loss of an oyster boat stranded on a wreck of a ship which had been sunk in navigable waters. Plaintiff claimed that the loss was due solely to the negligence of the Government in creating and marking the wreck. The Court held that marking the wreck was not a discretionary function, but also stated (page 635):

“... even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger.”

In *Dishman v. United States* (1940), 93 Fed. Supp. 567, plaintiff sued under the Federal Tort Claims Act for injuries sustained as a result of doctor employee of a Veterans Hospital erroneously pouring carbolic acid in his ear. The Court held the discretionary function exceptions did not apply. The Court stated (page 571):

“... This is not a case in which in the exercise of discretion or judgment, the officials of the Veterans Hospital declined to give plaintiff treatment, but it is a case where having exercised their discretion to give treatment, in accordance with the applicable regulations, the treatment given was negligent.”

The distinction between non-actionable planning and actionable negligence in carrying out the plan, was clearly stated by the Supreme Court in *Johnston v. District of Columbia*, 118 U.S. 19, 6 S.Ct. 923, 30 L.Ed. 75. Johnston's property was damaged when a sewer overflowed. He sued the District of Columbia, alleging that it “knowingly construed and continued upon an unreasonable and defective plan, and of inadequate capacity for its purpose, and wrongfully permitted [it] to become clogged up.” The Court said at pages 20-21:

“The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and gen-

eral convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."

So it is with the case at bar. There is no question that the decision to obtain private contractors to construct adequate housing at Sierra Ordnance Depot was within the discretion of the agency of the Federal Government involved, and it possibly could be successfully argued that a decision to issue orders and initiate a program for the occupancy of such housing was also a discretionary function. However, the complaint clearly establishes that both of those decisions were made. The implementation of these decisions by the employees at the Depot was an operational matter and in the performance of their duties no discretion was vested in them of a kind which would bring this case within the discretionary function exception in 28 U.S.C. 2680(a).

5. THE WRONGFUL CONDUCT CHARGEABLE TO THE DEFENDANT WAS NOT A TORT WHICH COULD BE CLASSIFIED AS "AN INTERFERENCE WITH CONTRACT RIGHTS".

The District Court grounded its judgment on the exception to governmental liability set forth in 28 U.S.C. 2680(h) which provides that the Federal Tort Claims Act shall not apply to "any claim arising out of . . . interference with contract rights . . ." There has been no clear cut judicial construction of the phrase "interference with contract rights." Some general rules of statutory construction might be helpful. Perhaps, the best was stated by Justice Frankfurter in *Indian Towing* at pages 68-69:

"The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court should not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."

The impact of the Tort Claims Act is general, not particular. The liability imposed by this Act constitutes a general waiver of sovereign immunity to tort claims against the United States. The exceptions are specific. In view of the difficulty of any sensible all inclusive definition of the term "tort," we might refer to a statement made by Dean Prosser in his well known work on the Law of Torts:

“... No better general statement can be made, than that the Courts will find a duty where, in general, reasonable men would recognize and agree that it exists.” (Section 31, p. 181.)

The complaint clearly establishes a duty on the part of the defendant. The question, therefore, is whether the duty shown by the allegations of the complaint falls within the classification of tort actions commonly known as “interference with contract rights.” The District Court, in holding that the cause of action involved an interference with contract rights, predicated its opinion in large part on the fact that the appellants were seeking recovery for a loss of rental income. Actually, however, loss of rental income constituted a relatively minor portion of the damages sued for. The complaint established that the appellants had an investment in the property of more than three million dollars; that this property, which was owned by the appellants, depreciated in value and, in fact, would be lost by reason of the negligent or wilful acts of the defendant. *In brief, the failure of the government’s employees to properly carry out the program resulted in a loss in the value of the property.* The Federal Tort Claims Act allows recovery for injury or damage to property resulting from wilful acts or omissions.

There is a basic distinction between the case at bar and the usual case of interference with contract rights. If the complaint charged nothing more than an interference with prospective tenants of the appellants, we would have a more or less clear case of interference with contract rights or interference with prospective profits or gains. In the case at bar, however, more than

that is alleged. The Department of Defense had set up a clear cut procedure as a result of which certain rights vested in appellants, at least the right to have that procedure properly implemented by the employees of the defendant. The complaint alleges, and the motion to dismiss admits, that this procedure was established and was not implemented either because of a wilful refusal or a negligent failure. Reasonable men would have realized that failure to implement the program would result in damage to the appellants and that the damages which would probably result from such failure would be a diminution in the value of the property. From this it follows that the causes of action alleged in the complaint are outside the scope of the concept "interference with contract rights."

It is respectfully submitted that the complaint states a cause of action.

VI.

CONCLUSION.

Appellants respectfully contend that the cause should be reversed and remanded with directions to the District Court to overrule the motion to dismiss and to require the defendant to plead.

Dated, Sacramento, California,

June 19, 1957.

Respectfully submitted,

LANDIS, BRODY & MARTIN,

Attorneys for Appellants.

United States
Court of Appeals
for the Ninth Circuit

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Northern Division.

No. 15533

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Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Northern Division

Civil No. 7250

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Count I

I.

This action is brought under the Federal Tort Claims Act, 28 U. S. C. 1346b, 2671 et seq.; and that the amount in dispute is in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, all of which hereinafter more fully appears.

II.

Plaintiff, Builders Corporation of America, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office in the City of Beverly Hills, County of Los Angeles, State of California.

III.

Plaintiff, Herlong Sierra Homes, Inc., is a corporation organized and existing under and by virtue

of the laws of the State of Nevada, with its principal office in the City of Reno, County of Washoe, State of Nevada. Herlong Sierra Homes, Inc., is licensed to do business in the State of California.

IV.

The defendant, the United States of America, acting through the Department of Defense, owns, operates, and maintains a military installation known as the Sierra-Ordnance Depot.

V.

Said Sierra-Ordnance Depot is a Federal enclave and is located in the County of Lassen, State of California, in a desolate and isolated area. The nearest points of urban development to said Sierra-Ordnance Depot are the City of Susanville in Lassen County, California, approximately forty miles northwest from said Depot, and the City of Reno in Washoe County, Nevada, approximately fifty-six miles southeast from said Depot. The military and civilian personnel, all of whom are agents and employees of the defendant, United States of America, necessary to operate and maintain said Depot are quartered on or near said Depot.

VI.

That the negligent or wrongful acts or omissions occurred in said Lassen County, State of California, within the jurisdiction of the United States Court of the Northern Division, of the Northern District, as herein more fully appears.

VII.

That Colonel G. H. Leavitt, at all times mentioned herein, was the Commanding Officer of the Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

VIII.

That Captain William K. Bouldin, at all times mentioned herein, was Assistant Post Engineer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

IX.

That Joseph H. Gill, at all times mentioned herein, was Executive Assistant of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

X.

That Virgil Leigh, at all times mentioned herein, was a Civilian Personnel Officer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XI.

That Herbert A. Hoyt, at all times mentioned herein, was Assistant Supply Officer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XII.

That C. Q. Johnson, at all times mentioned herein, was a Fiscal Officer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XIII.

The Federal Housing Administration was created by the National Housing Act approved June 27, 1934 (48 Stat. 1246, 12 U.S.C. 1702), as amended, and it functions as a constituent agency of the Housing and Home Finance Agency pursuant to Reorganization Plan 3 of 1947. The purpose of the Federal Housing Administration is to encourage improvements in housing standards and conditions, to provide a system of mutual mortgage insurance, and to exert a stabilizing influence on the mortgage market. It provides insurance against loss on loans made by private lending institutions. The Federal Housing Administration is authorized, under Title VIII of the National Housing Act, as amended, to insure mortgages on rental housing built by private

enterprise on or near military reservations for the use of civilian and military personnel of the Armed Forces, on certification by the Secretary of Defense. The Federal Housing Administration is authorized, under Title IX of the said National Housing Act, as amended, to insure mortgages on programmed housing in critical defense areas, whether such housing is for sale to persons qualified under the provisions of said National Housing Act, as amended, or is constructed as a rental project for such persons. Under authority of the Act of August 8, 1949 (63 Stat. 570), said Federal Housing Administration was authorized to insure mortgages on mortgaged property designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force (including Government contractor employees) assigned to duty at the military installation at or in the area of which such property is constructed. Said Act further provides that no such mortgage shall be insured unless the Secretary of Defense, or his designee, shall have certified to the Commissioner of the Federal Housing Administration that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

XIV.

That the Federal National Mortgage Association was organized pursuant to the provisions of Title

III of the said National Housing Act, as amended, and was transferred to the Housing and Home Finance Agency as one of its constituent agencies by Reorganization Plan 22 of 1950, effective July 10, 1950, and becoming effective September 7, 1950. Said Federal National Mortgage Association is an agency of the defendant, United States of America, established by the Congress to provide a secondary market for mortgages insured by the Federal Housing Administration and is authorized to purchase, service, or sell any mortgages which are insured under the said National Housing Act, as amended. Said Federal National Mortgage Association provides credit to assist veterans and others eligible for such credit assistance under the provisions of said National Housing Act, as amended, and, as one of its authorized functions, purchases mortgages from mortgagees approved by the Federal Housing Administration.

XV.

The Housing and Home Finance Agency was established by the President's Reorganization Plan 3 of 1947, effective July 27, 1947, (12 Fed. Reg. 4981) and is an agency of the defendant, United States of America, responsible for guiding the activities of the defendant, United States of America, in the field of housing to accomplish the objectives set forth in the National Housing Act as amended.

XVI.

By reason of the isolated location of said Sierra-Ordnance Depot, the defendant, The United States

of America, acting through the Department of Defense, had constructed housing at said Sierra-Ordnance Depot for the use of civilian and military personnel of said Depot; that said housing was constructed for temporary use and had become inadequate for the purposes for which it had been constructed.

XVII.

On or about the 6th day of July, 1950, in accordance with the provisions of the National Housing Act, as amended, the said Department of Defense entered into negotiations with the Federal Housing Administration and the Housing and Home Finance Agency to obtain construction of four hundred fifty-six (456) dwelling units to adequately house civilian and military personnel employed at said Sierra-Ordnance Depot; that to induce the Federal Housing Administration to insure mortgages for such construction and thereby obtain private persons and private lending institutions who would be willing to undertake and contract to construct said dwelling units, the said Department of Defense represented to said Federal Housing Administration and to said Housing and Home Finance Agency that by reason of a substantial in-migration of defense workers and military personnel needed for the operation, maintenance, and fulfillment of the primary function of said Sierra-Ordnance Depot, there existed a shortage of housing facilities for said Sierra-Ordnance Depot which impeded or threatened to impede the operation of said Sierra-Ordnance Depot,

and that said Sierra-Ordinance Depot was a critical defense housing area; that the existing housing at said Sierra-Ordinance Depot utilized for the housing of military and civilian personnel was inadequate from the standpoint of space allowance, heating and plumbing facilities, and electrical outlets; that the kitchens and bedrooms of said existing houses lacked modern appliances; that seven hundred seventy (770) apartments of said existing houses used coal burning stoves for heating and coal ranges for cooking and water heating. It was further represented to said Federal Housing Administration and said Housing and Home Finance Agency that the turnover in personnel at said Sierra-Ordinance Depot was largely due to inadequate housing and that inadequate housing was the cause of morale and welfare problems; it was further represented to said Federal Housing Administration and Housing and Home Finance Agency that respiratory diseases have increased due to overcrowdedness in the housing area and that as many as nine persons in a family occupy a unit of approximately five hundred feet; it was further represented to said Federal Housing Administration and Housing and Home Finance Agency that to assure the insurability of housing to be constructed under the authority of the said National Housing Act, as amended, certain existing housing on said Sierra-Ordinance Depot would be modified to permit larger family units, relieving the overcrowdedness then existing in the housing on said Sierra-Ordinance Depot, and that a number of the

other existing housing would be destroyed and thereby make available civilian and military personnel to occupy the housing to be constructed under authority of said National Housing Act, as amended, and thus assure the return of any expenditures made by the said Federal Housing Administration and Housing and Home Finance Agency in connection with the insurance to be granted to any person agreeing to construct said housing on or near the said Sierra-Ordnance Depot.

XVIII.

That thereafter on, to wit, the 24th of October, 1951, the Secretary of the Army, acting in pursuance of his authority, certified to the Federal Housing Administration, that one hundred thirteen (113) family units in multiple family structures and twelve (12) single family structures were necessary to provide adequate rental housing for civilian and military personnel assigned to duty at said Sierra-Ordnance Depot, that such military installation was deemed to be a permanent part of the Department of the Army, and that there was no present intention to substantially curtail activities at such installation. It was further certified by said Secretary of the Army that the military and civilian personnel who were expected to occupy the said dwelling units and for whom said rental housing was intended, would be capable of paying the proposed monthly rentals per family unit as set forth in said certifications.

XIX.

That by virtue of the request of the Department of the Army, the said Housing and Home Finance Agency, with the approval of the Department of the Army, programmed one hundred fifty (150) family dwelling units for rental housing for the civilian and military personnel of said Sierra-Ordnance Depot, and to meet the housing needs of essential immigrant defense workers, including members of the Armed Forces, employed in or stationed at the Sierra-Ordnance Depot, and by reason thereof, the Federal Housing Administration, under authority of the said National Housing Act, as amended, agreed to insure any mortgages on said dwelling units.

XX.

Thereafter, by reason of the representations made by the Department of the Army and the commitment of the Federal Housing Administration to insure a mortgage in the amount of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars (\$1,113,700.00), the plaintiff, Herlong Sierra Homes, Inc., filed its application, received approval, and thereafter undertook to construct one hundred twenty-five (125) dwelling units in accordance with specifications, plans and drawings issued and approved by the Department of the Army and Federal Housing Administration and in accordance with the provisions of said National Housing Act, as amended, and the rules and regulations promulgated thereunder. Plaintiff, Herlong Sierra Homes, Inc., agreed to reserve the completed dwelling units

for rent to civilian and military personnel of said Sierra-Ordinance Depot at approved rentals to be charged for said dwelling units as follows:

- 43 units at a rental of \$70.00 per month;
- 30 units at a rental of \$73.40 per month;
- 16 units at a rental of \$83.40 per month;
- 10 units at a rental of \$91.25 per month;
- 9 units at a rental of \$96.25 per month;
- 3 units at a rental of \$111.25 per month.

XXI.

That the plaintiff, Herlong Sierra Homes, Inc., obtained a mortgage loan from the Manufacturers Trust Company of New York in the sum of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars (\$1,113,700.00), which said loan was to be refinanced by the Manhattan Savings Bank of New York and to be secured by a mortgage on said dwelling units and other property executed by plaintiff, Herlong Sierra Homes, Inc., and insured by the Federal Housing Administration; that said lending institutions were and are approved as such by the Federal Housing Administration.

XXII.

That the plaintiff, Herlong Sierra Homes, Inc., was approved by the said Federal Housing Administration as the mortgagor for said loan and thereafter fully complied with all of the conditions and requirements for the construction of said dwelling units and all of said dwelling units were completed and ready for occupancy in January, 1954.

XXIII.

That the plaintiff, Builders Corporation of America, by reason of the representations made by the Department of Defense and the commitment of the Federal Housing Administration to insure a mortgage of One Million Two Hundred Sixty-one Thousand Three Hundred Dollars (\$1,261,300.00) for the dwelling units programmed by the Housing and Home Finance Agency filed its application, received approval, and thereafter undertook to construct one hundred fifty (150) dwelling units in accordance with plans, specifications, and drawings issued and approved by the Department of Defense and Federal Housing Administration and in accordance with the provisions of the said National Housing Act, as amended, and the rules and regulations promulgated thereunder. Plaintiff, Builders Corporation of America, agreed to reserve the completed dwelling units for sale or rent to civilian and military personnel of said Sierra-Ordnance Depot at approved sales prices and that the rentals to be charged for said dwelling units were to be as follows:

- 5 units at a rental of \$65.00 per month;
- 91 units at a rental of \$75.00 per month;
- 54 units at a rental of \$85.00 per month.

XXIV.

That plaintiff, Builders Corporation of America, obtained a loan in the sum of One Million Two Hundred Sixty-one Thousand Three Hundred Dol-

lars (\$1,261,300.00) from the California Bank of Los Angeles, which said loan was to be purchased by the Federal National Mortgage Association and secured by a mortgage on the said dwelling units and other property executed by the plaintiff, Builders Corporation of America; that said Federal National Mortgage Association is authorized by law to purchase said mortgages and that said mortgage was insured by the Federal Housing Administration.

XXV.

That plaintiff, Builders Corporation of America, was approved by said Federal Housing Administration as the mortgagor for said loan and fully complied with all of the conditions and requirements for the construction of said dwelling units and said dwelling units were ready for occupancy in August, 1954.

XXVI.

That the total sum expended or obligated by plaintiff for the construction of said dwelling units amounted to the sum of Six Hundred Thousand Dollars (\$600,000.00), in addition to the sum of Two Million Three Hundred Seventy-five Thousand Dollars (\$2,375,000.00) obtained by plaintiff under said loans.

XXVII.

That on, to wit, the 23rd day of January, 1954, the Commanding General, Sixth Army, Department of Defense, acting within authority duly granted him, notified Colonel G. H. Leavitt then and there

the Commanding Officer of the Sierra-Ordnance Depot, that the housing constructed by plaintiffs was not being occupied by personnel of the Sierra-Ordnance Depot and directed said Commanding Officer to initiate and develop a co-ordinated and aggressive program to assure maximum occupancy.

XXVIII.

That on, to wit, the 28th day of April, 1954, the Commanding General, Sixth Army, Department of Defense, acting within the authority duly granted him, notified Colonel G. H. Leavitt then and there Commanding Officer of the said Sierra-Ordnance Depot, that no major difficulties in obtaining full occupancy of the dwelling units constructed by plaintiffs herein at said Sierra-Ordnance Depot was expected, and said Commanding General, acting under authority duly granted him, directed that in order to accellerate full occupancy of said dwelling units and to present maximum opportunity to those not able to afford the rents required to be paid for said dwelling units, income limitations commensurate with the size of the family to be established for those who were to be permitted to occupy the government housing. It was further directed that, in the event said action did not bring about the desired result, steps should be taken to demolish certain of the temporary housing units, as was initially agreed upon and considered when the dwelling units to be constructed by plaintiffs were authorized at said Sierra-Ordnance Depot.

XXIX.

That on, to wit, the 24th day of June, 1954, under authority of the Commanding General, Sixth Army, orders and directives were issued to Colonel G. H. Leavitt, then and there the Commanding Officer of the Sierra-Ordnance Depot, as follows:

(a) An income limitation (with a sliding scale for dependents) to be established above which military and civilian personnel at Sierra-Ordnance Depot would not be permitted to occupy present government housing.

(b) Notice to be served on all tenants of the government housing whose incomes were above the salary limit as directed that their quarters be vacated not later than the 1st day of September, 1954.

(c) Notice to be served on tenants of government housing who were not employees of the Department of the Army, but rendering services to the Sierra-Ordnance Depot that, unless there was some contract or operating agreement which guarantees these persons on post housing, to vacate their government housing not later than the 1st day of September, 1954.

(d) To select a total of one hundred twenty-five (125) sets of substandard family quarters for disposal.

XXX.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A.

Hoyt, and C. Q. Johnson, agents and employees of the defendant United States of America, knew that by reason of the isolated area in which said dwelling units constructed by plaintiffs were located, the only available occupants and tenants for said dwelling units were the military and civilian personnel for whom said rental units had been programmed, authorized, and constructed; that after completion of said dwelling units, the plaintiffs would be required to expend large sums of money for payment on the principal and interest on mortgages, taxes, and in operation and maintenance of the property; that without rental income from said dwelling units, plaintiffs would be unable to meet those obligations without great loss.

XXXI.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant, United States of America, acting within the scope of their respective offices and employment, with intention of damaging plaintiff's, deliberately, intentionally, and wilfully failed and refused to carry out the orders issued as aforesaid and failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by plaintiffs; failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of the Sierra-Ordnance Depot; failed and refused to take

any action to demolish any of the temporary and substandard housing; and failed and refused to issue notices to those specified in said orders to vacate government housing not later than the 1st day of September, 1954.

XXXII.

That United States of America, Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and their respective offices and employment, and for the purpose of preventing and delaying compliance with the orders and directives heretofore alleged and to circumvent such orders and directives so as to prevent the military and civilian personnel from occupying said rental housing, did represent to the Commanding General, Sixth Army, and to the Federal Housing Administration and to the Housing and Home Finance Agency that plaintiffs had improperly constructed said housing in that there were, among others, the following structural defects:

Water Seepage through pumice block walls.

Nails working out of woodwork through plaster and painted interior walls.

Inadequate operation of washing machines, due to low water pressure.

Unsatisfactory operation of gas range burners.

Washing away of cement used with ceramic tile.

Porosity resulting in sand seeping in through cracks and around doors and windows at junctions of the ceilings and walls and exhaust areas over gas ranges.

Unsatisfactory floors.

Low water pressure, and dangerous conditions in case of fire by reason thereof.

Deficiencies in roads serving these dwelling units.

Inadequacy of gas space heating units.

Inadequate clothes lines and other structural defects.

That by reason of such structural defects, the military and civilian personnel could not live in said housing; that the plaintiffs were charging rentals in excess of the agreed rentals; that plaintiffs had imposed high utility costs;

that each and all of said representations were false and untrue and that Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, and each of them, knew said representations were false and untrue, and were made by them, and each of them, for the sole purpose of circumventing the orders and directives issued by the Commanding General of the Sixth Army and justifying their disobedience of said orders; that said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope

of their authority and employment, made similar misrepresentations to the military and civilian personnel employed at Sierra-Ordnance Depot to induce, persuade, coerce, and entice said military and civilian personnel from moving into the dwelling units constructed by plaintiffs; that said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and employment, by threats and intimidation and abuse of the authority vested in them by virtue of their respective positions, sought to and did preclude and prevent said military and civilian personnel from moving into said dwelling units constructed by plaintiffs, and said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and employment, attempted to and did induce and incite the military and civilian personnel to interfere with the occupancy of said dwelling units, and of the rights and privileges granted by the United States to the plaintiffs.

XXXIII.

That by reason of the wrongful acts of the defendant, its employees and agents, plaintiffs incurred a loss in rental income and were otherwise damaged in the sum of Three Million Four Hundred Seventy-five Thousand no/100 Dollars (\$3,475,000.00).

Wherefore, plaintiffs pray for judgment in the amount of Three Million Four Hundred Seventy-five Thousand and no/100 (\$3,475,000.00), for costs of suit and for such other and further relief as to the court may seem proper.

Count II.

As and for a Second Cause of Action Plaintiffs
Allege:

I.

Plaintiffs reaffirm and especially refer to paragraphs I to XXX of the first cause of action herein set forth, and ask that they be taken as and made a part of this cause of action the same as if specifically set forth in haec verba.

II.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, acting within the scope of their respective offices and employment, carelessly and negligently failed and refused to carry out the orders issued as aforesaid, and carelessly and negligently failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by plaintiffs, and carelessly and negligently failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of

the Sierra-Ordinance Depot; and carelessly and negligently failed and refused to demolish any of the temporary and substandard housing; and carelessly and negligently failed and refused to issue notices to those specified in said orders to vacate government housing not later than September 1, 1954.

III.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and their respective offices and employment, inspected the dwelling units constructed by plaintiffs in so careless, negligent, and perfunctory manner and said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, relying on rumor and hearsay, represented to the Commanding General, Sixth Army, and to the Federal Housing Administration and to the Housing and Home Finance Agency that plaintiffs had improperly constructed said housing in that there were, among others, the following structural defects:

Water seepage through pumice block walls.

Nails working out of woodwork through plaster and painted interior walls.

Inadequate operation of washing machines, due to low water pressure.

Unsatisfactory operation of gas range burners.

Washing away of cement used with ceramic tile.

Porosity resulting in sand seeping in through cracks and around doors and windows at junctions of the ceiling and walls and exhaust areas over gas ranges.

Unsatisfactory floors.

Low water pressure, and dangerous conditions in case of fire by reason thereof.

Deficiencies in roads serving these dwelling units.

Inadequacy of gas space heating units.

Inadequate clothes lines and other structural defects.

That by reason of such structural defects, the military and civilian personnel could not live in said housing; that the plaintiffs were charging rentals in excess of the agreed rentals; that plaintiffs had imposed high utility costs.

That each and all of said representations were false and untrue; that said misrepresentations resulting from the careless and negligent inspection made by said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, were made also to the military and civilian personnel employed at said Sierra Ordnance Depot and as a proximate and direct result of said careless and negligent inspection and misrepresentations, said military and civilian personnel refused to rent or occupy the dwelling units constructed by plaintiffs.

IV.

That by reason of the negligent and careless acts of the defendant, its employees and agents, plaintiffs incurred a loss in rental income and were otherwise damaged in the sum of Three Million Four Hundred Seventy-five Thousand and no/100 Dollars (\$3,475,000.00).

Wherefore, plaintiffs pray for judgment in the amount of Three Million Four Hundred Seventy-five Thousand and no/100 (\$3,475,000.00), for costs of suit and for such other and further relief as to the court may seem proper.

Dated: June 24, 1955.

LANDIS AND BRODY,

By /s/ ALVIN LANDIS,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: Landis and Brody, Attorneys at Law, Room 1108, 926 J Building, Sacramento 14, California:

Please Take Notice that on Monday, June 18, 1956, at 9:30 a.m. in the courtroom of the Master Calendar Judge, United States Courthouse and

Post Office Building, Sacramento, California, the defendant will move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action because the court lacks jurisdiction over the subject matter of the action pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C., Section 1346(b), 2671, et seq. (1952).

LLOYD H. BURKE,

United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,

Assistant United States
Attorney.

Affidavit of mail attached.

[Endorsed]: Filed May 26, 1956.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This is an action to recover damages against the United States of America under the provisions of the Federal Tort Claims Act (28 U.S.C.A., §§ 2671, et seq., and § 1346(b)) for the alleged loss of anticipated rental income from dwelling units constructed by plaintiffs adjacent to the Sierra Ordnance Depot, a military installation of the United

States near Herlong, California. Plaintiffs allege that pursuant to a declared public policy of the United States to stimulate and encourage private construction of dwelling units to alleviate the acute housing shortages near federal military installations (Chapter 403, Public Law 211, 81st Congress, 1st Session [63 Stat. 570; 12 U.S.C.A. §§ 1748, et seq., as amended]), the Secretary of the Army on October 24, 1951, certified to the Federal Housing Administration that a need for housing facilities for base personnel of the Sierra Ordnance Depot existed. Plaintiffs further allege that thereafter the Federal Housing Administration, acting pursuant to statutory authority (12 U.S.C.A., §§ 1702, et seq., as amended), agreed to insure mortgages in the amount of \$1,113,700 on 125 dwelling units to be constructed by plaintiff, Herlong Sierra Homes, Inc., and to insure mortgages in the amount of \$1,261,000 on 150 dwelling units to be constructed by plaintiff, Builders Corporation of America, all of which said dwelling units were to be constructed adjacent to the Sierra Ordnance Depot. Plaintiffs further allege that the Commanding General of the Sixth Army issued an order to the Base Commander of the Sierra Ordnance Depot directing him to follow certain procedures set forth in the order for the general purpose of compelling base personnel to vacate the homes, in which they were then living, and become tenants of the plaintiffs "not later than September 1, 1954." It is alleged that the Base Commander failed and refused to carry out this order, and it is on this alleged failure

and refusal that plaintiffs seek to found their two causes of action. The first cause of action is predicated on the theory that the Base Commander refused to carry out the aforementioned order with the intent to injure plaintiffs' business interests, and prevent plaintiffs from entering into an anticipated business relationship with the base personnel. The second cause of action is predicated on the theory that the Base Commander's alleged failure to carry out the order and plan submitted to him was negligence which directly caused plaintiffs' loss of rental income. Damages in the sum of \$3,475,000 are sought on both causes of action.

Defendant has filed a motion to dismiss based, generally, on the contention that neither cause of action is cognizable under the provisions of the Federal Tort Claims Act, the alleged tortious conduct of the Base Commander having arisen in the course of exercising a "discretionary" function or duty (28 U.S.C.A., § 2680(a)). Defendant further contends, *inter alia*, that the first cause of action is grounded on the tort of interference with contractual relations within the meaning of Title 28 U.S.C.A. § 2680(h), and, hence, is barred by the exclusion provisions of the Act. Defendant contends that the second cause of action fails to state a claim in negligence for the reason that defendant owed no duty to plaintiffs to protect plaintiffs from the type of loss which they suffered.

The alleged wrongful act of the Base Commander for which plaintiffs seek a recovery under their first

cause of action appears to be the tort of "interference with prospective advantage" (Prosser on Torts, p. 745 [2d Ed., 1955]), sometimes labeled "interference with prospective contracts or business relations" (*Masoni vs. Board of Trade*, 119 Cal. App. 2d 738, 260 Pac. 2d 205). Since Congress has decided not to surrender the immunity of the United States from tort actions based on interference with contract relations (28 U.S.C.A., § 2680 (h)), the essential issue which this Court must decide, then, is whether the tort of interference with prospective advantage or prospective contracts is properly includable within the aforementioned exception to the Tort Claims Act. It would seem to be quite illogical to conclude that Congress intended to exclude one tort from the operation of the Act, and, at the same time, waive the Government's immunity from actions sounding in a substantially identical tort; the distinction between the two being one of degree, only, in the elements necessary to establish liability.¹ Congressional intent need not be further pondered, however, for under the substantive tort law of California, by which we are bound in this case (cf. *Massachusetts Bonding Co. vs. United States*, 352 U. S. 128), no distinction be-

¹Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor. In one case the interference takes place when a contract is already in existence, in the other, when a contract would, with certainty, have been consummated but for the conduct of the tortfeasor. (See Prosser on

tween "interfering with contract relations" and "interfering with prospective contract or business relations" is recognized except in the factual situations which are considered essential to the existence of liability for the substantive tort of "interference."² Thus, in *Masoni vs. Board of Trade*, *supra*, at p. 741, it was stated:

"Actionable interference of this kind is not limited to inducing breach of an existing contract or other wrongful conduct but comprises also unjustifiably inducing a third person not to enter into or continue a business relation with another." (Citing the Restatement of Torts, § 766(a) and (b).)

(See also: *Campbell vs. Rayburn*, 129 Cal. App. 2d 232; *Guillory vs. Godrey*, 134 Cal. App. 2d 628; *Wilson vs. Loew's, Inc.*, 142 A.C.A. 191; and 28 Cal. Jur. 2d 427, *Interference*, §§ 7 and 8.)

Few federal cases have dealt with the exclusion of interference with contract relations from federal

Torts. pp. 720, et seq., and pp. 745, et seq. [2d Ed. 1955]). Rather than characterizing the two as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, *inter alia*, an interference with an existing contract or a contract which is certain to be consummated, with broader grounds for justification of the interference where the latter situation is presented.

²Note 1, *supra*.

tort liability,³ but the case of *Fletcher vs. Veterans Administration*, 103 F. Supp. 654 [E. D. Mich.], provides a helpful analogy. In that case plaintiff operated a school supported primarily by veteran enrollees, but the Veterans Administration, for undisclosed reasons, thereafter advised the veterans against enrolling in the school with the result that plaintiff was left with empty classrooms, and was forced to discontinue his operations. The ensuing

³Only two have been found, *Nicholson vs. United States*, 177 F. 2d 768, and *Fletcher vs. Veterans Administration*, 103 F. Supp. 654. The *Nicholson* case held merely that an action between two parties to a contract for injuries caused by the negligence of one, was not an action for interference with contractual relations. The *Fletcher* case is discussed in the main text.

Plaintiffs contend that the case of *Oman vs. United States*, 179 F. 2d 738, is determinative of the question. In that case, the Court permitted the plaintiff to maintain an action against the United States for damages arising out of the government's permitting third persons to invade plaintiff's exclusively granted grazing territory on the public domain. The principal question before the Court in that case was whether the action was barred by the discretionary function exception in Title 28, U.S.C.A., § 2680(a), the Court holding that the government agents had no discretion to pursue a course of conduct tantamount to a revocation of plaintiff's exclusive grant without employing the established procedure to effect such a revocation. The action clearly was not based on the tort of interference with contract relations, but was more closely akin to an action in the nature of trespass. With facts so materially different, the holding in the *Oman* case was clearly not addressed to the issue before the Court in the case at bar.

action against the Veterans Administration for "negligence" in causing the loss of existing and future business opportunity was dismissed as an action based on interference with contract rights within the meaning of § 2680(h), Title 28, U.S.C.A.

In view of the foregoing authorities, this Court is of the opinion that the United States did not waive its immunity from the type of claim which plaintiffs assert by their first cause of action, hence, no useful purpose would be served by here ruling on defendant's contention that this cause of action is likewise barred under the "discretionary function" exception enunciated in § 2680(a), *supra*.

In order to recover damages on their second cause of action, based on negligence, it is essential that plaintiffs allege and prove that defendant owed them a duty to conform to a standard of conduct which would prevent the kind of injury which plaintiffs allegedly suffered. This is the rule in California (*Routh vs. Quinn*, 20 Cal. 2d 488), and is likewise applicable to actions based on negligence under the Federal Tort Claims Act (*The Dalles City vs. River Terminals Company*, 226 F. 2d 100; *Social Security Admin. Baltimore F.C.U. vs. United States*, 138 F. Supp. 639; *Mid-Central Fish Co. vs. United States*, 112 F. Supp. 792, *aff'd* 210 F. 2d 263; and *Anglo-American and Overseas Corp. vs. United States*, 144 F. Supp. 635).

What the scope of duty is in any given case seldom admits of easy definition. Perhaps the most

helpful analysis is tendered by Dean Prosser in his treatise on torts, where he states:

“The statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” (Prosser on Torts, p. 167 [2d Ed. 1955].)

Plaintiffs’ contentions in this regard are based essentially on a theory that Congress, by enacting laws designed to encourage the construction by private businesses of dwelling facilities near military installations, intended to create a duty on the part of the commanding officers of such installations to provide the owners of such housing facilities with tenants so that their investment would be a profitable one. However, an analysis of the statutory provisions (12 U.S.C.A., §§ 1748, et seq.), and their legislative history (House Report No. 854, 81st Congress, 1st Session, June 20, 1949) yields a different conclusion. Of basic concern to Congress was the critical need for adequate housing and living facilities around vital defense installations and the possibility of serious consequences to personnel morale arising from undesirable living conditions. To implement the program designed to alleviate this situation, Congress determined that the desired results could best be obtained by the encouragement of the private construction industry to undertake the building projects. Such an undertaking for the Federal Government, it was decided, would be too costly and otherwise unfeasible. Government intervention

was, hence, limited to assisting the private construction industry in obtaining the necessary financing by insuring their indebtednesses through the Federal Housing Administration. No duty, however, was placed on the Government to insure the financial success of the private projects; to the contrary, Congress acknowledged a duty only in developing the defense effort to its fullest potential, and recognized that the morale of defense personnel was an indispensable factor in bringing about the success of the program.

If plaintiffs are to rely on the existence of a statutory duty, it is essential that they show that the statute is designed for their benefit, or for those of a class of which they are members (*Anglo-American and Overseas Corp. vs. United States, supra*; *Social Security Admin. Baltimore F.C.U. vs. United States, supra*; *Mid-Central Fish Co. vs. United States, supra*; and *Routh vs. Quinn, supra*). No such showing is made by plaintiffs in this case.

Before a duty can be said to exist, even in the absence of statute, the plaintiff in a negligence action must show that his injury occurred as a result of the invasion by the defendant of a legally protectable interest. Plaintiff has alleged, at best, the deprivation of an expectancy only,⁴ and while a

⁴The cases of *Smith vs. United States*, 113 F. Supp. 131, and *Oman vs. United States, supra*, note 4, are not helpful to plaintiffs' position in this connection. Both of these cases involve tangible, existing legal interests, and are addressed to the discretionary function exception to the Tort Claims Act.

definite business expectancy may be considered a protectable interest in a proper case, the Court has already concluded that the Tort Claims Act does not contemplate actions based on interference with business expectations. These fatal defects in the plaintiffs' complaint render the second cause of action likewise subject to a motion to dismiss.

For the reasons above set forth plaintiffs' complaint and each of the causes of action attempted to be set forth therein are, and each of them is, hereby dismissed. Let a judgment in favor of the defendant be entered herein on each of the causes of action attempted to be set forth in plaintiffs' complaint. Defendant will prepare and lodge with the Clerk of this Court all papers and documents necessary for the final disposition of this case.

Dated: February 19, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed February 19, 1957.

To hold that one who assists another in financing the construction of rental facilities owes a concomitant duty to the other (in the absence of statute or contract) to assist him in acquiring tenants would be to create a novel and heretofore unprecedented substantive tort liability for a private citizen as well as the government. This Court declines the invitation to create such a duty.

In the United States District Court for the Northern District of California, Northern Division

Civil No. 7250

BUILDERS CORPORATION OF AMERICA, a
Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for hearing on defendant's motions to dismiss on July 16, 1956, before the Court, Honorable Sherrill Halbert, United States District Judge, presiding. Alvin Landis, Esq., appeared for plaintiffs and Lloyd H. Burke, Esq., United States Attorney, by Marvin D. Morgenstein, Esq., Assistant United States Attorney, appeared for defendant.

Defendant's motions having been submitted for decision upon briefs and oral argument, and the Court, on February 19, 1957, having made and entered its order that the complaint, and each of the causes of action attempted to be set forth in the complaint are dismissed.

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing by their complaint; that

defendant's motion to dismiss Count One of the Complaint for lack of jurisdiction and Count Two of the Complaint for failure to state a claim are granted; that plaintiffs' complaint and each of the causes of action attempted to be set forth therein are dismissed in accordance with Rule 41(b) of the Federal Rules of Civil Procedure; and that costs are awarded to defendant in the amount of \$20.00.

Dated: March 12th, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

Affidavit of Mail attached.

Lodged March 2, 1957.

[Endorsed]: Filed March 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Builders Corporation of America, a corporation, and Herlong Sierra Homes, Inc., a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order entered February 19, 1957, dismissing plaintiffs' complaint and from the final judgment entered in this action on March 12, 1957.

Dated : March 28, 1957.

LANDIS, BRODY & MARTIN,

By /s/ ALVIN LANDIS,
Attorneys for Appellants, Builders Corporation of
America, a Corporation, and Herlong Sierra
Homes, Inc., a Corporation.

[Endorsed]: Filed April 4, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

June 2—Filed complaint, issued summons.

Aug. 12—Filed summons on ret. unex., at the request of the attorney for the plaintiffs.

1956

Feb. 23—Issued alias summons.

Mar. 2—Filed alias summons on ret. ex., 2-27-56.

Apr. 23—Filed stip. ex. time to plead.

May 26—Filed notice of motion to dismiss.

June 6—Filed memo of points & authorities in support of motion to dismiss.

June 18—Ord. case con. to July 16th, 1956, for hearing on motion to dismiss.

July 9—Filed memorandum in opposition to motion to dismiss.

July 16—Hearing; Ord. U. S. have 5 days to file closing memo. Case con. to July 30th, 1956, for further proceedings.

1956

- July 30—Ord. case con. to Sept. 17th, 1956, for further proceedings.
- Sept. 17—Ord. case con. to Oct. 15th, 1956, for further proceedings.
- Oct. 15—Ord. case con. to Nov. 13th, 1957, for further proceedings.
- Nov. 13—Ord. case con. to Dec. 10th, 1956, for further proceedings.
- Dec. 10—Ord. case con. to Feb. 18th, 1957, for further proceedings.

1957

- Feb. 18—Ord. motion to dismiss submitted.
- Feb. 19—Ord. motion to dismiss granted, and that judgment be entered herein in favor of defendant. Filed memorandum & order. Mailed copies.
- Mar. 2—Lodged proposed judgment.
- Mar. 12—Filed judgment in favor of defendant and against plaintiff, with costs in the sum of \$20.00.
- Mar. 12—Entered judgment (Filed March 12th, 1957). Mailed notices to attorneys.
- Apr. 4—Filed notice of appeal. Mailed notice to U. S. Attorney. Filed cost bond on appeal.
- Apr. 9—Filed designation of contents of record on appeal.
- Apr. 24—Made Record on Appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal here as designated:

1. Complaint.
2. Notice of motion to dismiss.
3. Memorandum and order.
4. Judgment.
5. Notice of appeal.
6. Cost bond on appeal.
7. Designation of the contents of the record on appeal.
8. Docket entries.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 24th day of April, 1957.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15533. United States Court of Appeals for the Ninth Circuit. Builders Corporation of America, a Corporation, and Herlong Sierra Homes, Inc., a Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed April 25, 1957.

Docketed April 29, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15533

BUILDERS CORPORATION OF AMERICA,
a Corporation, and **HERLONG SIERRA**
HOMES, INC., a Corporation,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellee.

APPELLANTS' STATEMENT OF POINTS

Appellants, plaintiffs in the above-entitled action, intend to rely upon the appeal of the above-entitled action upon the following points:

1. The complaint sets forth a good cause of action under the Federal Tort Claims Act, Title 28, U. S. Code, Sections 2671, et seq., and Title 28, U. S. Code, Section 1346(b).
2. The District Court erred in sustaining the defendant's motion to dismiss the complaint.
3. The District Court erred in entering judgment in favor of the defendant upon the motion to dismiss filed by the defendant.

Dated: May 6, 1957.

LANDIS, BRODY & MARTIN,
Attorneys for Appellants.

[Endorsed]: Filed May 7, 1957.

No. 15535

United States
COURT OF APPEALS
for the Ninth Circuit

FLORENCE O'CAMPO,

Appellant,

v.

EDNA HARDISTY, PAUL H. WRIGHT, R.
V. RUSHFORD, N. P. HUGHES and N.
DRAKULICH,

Appellees.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

BRIEF FOR THE APPELLEES
Wright, Rushford, Hughes, Drakulich

C. E. LUCKEY,
United States Attorney for the District of Oregon,

EDWARD J. GEORGEFF,
Assistant United States Attorney,
United States Courthouse,
Portland, Oregon,

*Attorneys for Appellees Wright, Rushford, Hughes and
Drakulich.*

FILED

FEB 3 1958

PAUL P. O'BRIEN, CLERK

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United States
COURT OF APPEALS
for the Ninth Circuit

FLORENCE O'CAMPO,

Appellant,

v.

EDNA HARDISTY, PAUL H. WRIGHT, R.
V. RUSHFORD, N. P. HUGHES and N.
DRAKULICH,

Appellees.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

BRIEF FOR THE APPELLEES
Wright, Rushford, Hughes, Drakulich

OPINION BELOW

The opinion (R. 12) of the District Court is reported
at 147 F.Supp. 850.

JURISDICTION

This appeal involves an action instituted in the Circuite Court of the State of Oregon for the County of Multnomah for damages from four Internal Revenue

Service employees and a former employee of plaintiff for an alleged conspiracy to ruin and destroy plaintiff's nursing home business. The four government employees were served individually on June 20, 1956, and thereafter on June 28, 1956, joined in removal of the case pursuant to 28 USC 1442 to the District Court of the United States for the District of Oregon. (R. 1-6). On July 6, 1956, within the time permitted under Rule 81(c) of the Federal Rules of Civil Procedure for answer or presentation of other defenses or objections, these defendants filed a motion to make more definite and certain. (R. 7). Also on July 6, 1956, a request for admission of facts by plaintiff, pursuant to Rule 36, F.R.C.P., was filed and served on behalf of the four Internal Revenue Service employees. (R. 8). Plaintiff failed to respond within the specified ten days and these defendants, on July 19, 1956, moved for summary judgment (R. 10), which after hearing was granted, and judgment entered November 12, 1956. (R. 13). Plaintiff's motion for rehearing (R. 14) was denied by order of December 27, 1956, (R. 15) and plaintiff filed notice of appeal on January 25, 1957. (R. 16). The jurisdiction of this Court is invoked under the provisions of 28 USC 1291.

QUESTION PRESENTED

Did the District Court err in granting summary judgment for defendants and finding the four Internal Revenue Service employees immune from suit because their actions were done in relation to, or more or less in connection with, the general matters committed by law to their control and supervision?

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*.

STATEMENT

The following facts were deemed admitted under Rule 36, F.R.C.P. by plaintiff's failure to serve within the specified time (1) a sworn statement denying specifically the matters of which admissions were requested or setting forth in detail the reasons why she could not truthfully admit or deny those matters, or (2) written objections.

Before the commencement of this action and at all the times hereinafter mentioned, defendants other than Edna Hardisty, were and now are employees of the Internal Revenue Service of the United States of America, Paul H. Wright being Chief of Delinquent Accounts and Returns Branch, R. V. Rushford being a Group Supervisor, Norman P. Hughes being a Collection Officer, and Nick Drakulich being a Group Supervisor.

At all the times mentioned in said action, these defendants were acting solely under color of their respective offices and by authority of the Internal Revenue laws of the United States and all their acts in connection with the matters charged in plaintiff's complaint were committed by each of them under color of their respective offices.

Florence O'Campo, plaintiff, was indebted to the United States of America for withholding taxes for the

September and December 1951 and March, June, September and December 1955 quarterly periods, as follows:

WE	September	1951	\$111.74
WE	September	1951	188.89
WE	December	1951	69.93
WE	March	1955	335.84
WE	June	1955	171.06
WE	September	1955	296.31
WE	December	1955	348.13

together with interest and statutory penalties thereon.

Numerous conferences were held with plaintiff commencing in October 1952, with respect to the above-mentioned tax liabilities, but plaintiff failed and refused to satisfy said tax delinquencies until June 15, 1956.

On May 18, 1956, plaintiff was informed that distraint action was contemplated by the Internal Revenue Service unless the delinquent taxes were paid.

On June 14, 1956, the aforementioned delinquent taxes remained unpaid and a Notice of Seizure and Sale was served by the Internal Revenue Service, covering plaintiff's property at 10305 Southeast 82nd Avenue, Portland, Oregon. Plaintiff operated a rest home on said premises and a number of aged and bedridden patients were confined there. The premises were not padlocked by the Internal Revenue Agents.

On June 15, 1956, at 4:45 P.M. plaintiff appeared at the Internal Revenue Service office in Portland, Oregon, paid her delinquent taxes and thereafter certificates of release of federal tax liens were filed of record by the Internal Revenue Service.

The foregoing facts were set forth in the duly verified petition for removal (R. 1), and were included in the request for admission of facts. (R. 8).

SUMMARY OF ARGUMENT

This civil action commenced in the state court for damages from four Internal Revenue Service employees and another for an alleged conspiracy to destroy plaintiff's nursing home business, was properly removed by them to the District Court as an action against an officer of the United States or any agency thereof, or person acting under him, for acts under color of such office or on account of a right, title or authority claimed under an Act of Congress * * * * for the collection of the revenue.

Plaintiff admits that some of the things done by the four Internal Revenue Service employees were in connection with their acts as employees of the federal government, and that they were acting under color of their official duties.

Since the actions of the four Internal Revenue Service employees were done in relation to, or more or less in connection with, the general matters committed by law to their control and supervision, they are immune from personal liability.

ARGUMENT

The District Court's Finding and Conclusion — That the Actions of the Four Internal Revenue Service Employees Were Done in Relation to, or More or Less in Connection with, the General Matters Committed by Law to Their Control and Supervision and That Therefore They Were Immune from Suit — Was Supported by Record Evidence and, Accordingly, the Summary Judgment Should Be Affirmed.

A. Removal was proper.

Following removal of the case pursuant to 28 USC 1442 to the District Court (R. 1-6), and at the hearing on the motions for summary judgment (R. 10) and dismissal (R. 11) plaintiff's counsel questioned legality of the removal (Tr. 3-6), no formal motion to remand ever having been filed. In the statement of points upon which she intends to rely upon appeal (R. 21), appellant sets forth that "The Court erred in removing said cause", but appellant's brief contains no argument on this point, and cites no authorities for her position.

Plaintiff's complaint (R. 4), as filed in the state court, contained no allegations providing a basis for removal. The four Internal Revenue Service employees named defendants, however, stated generally in their duly verified petition for removal (R. 1) that they "were acting solely under color of their respective offices" and specifically facts showing that their actions in advising guardians and relatives of plaintiff's patients of the proposed seizure of the nursing home for failure to pay federal taxes were acts done under color of office.

The removal statute 28 USC 1442(a)(1) provides:

"A civil action * * * commenced in a state court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: * * * Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress * * * for the collection of the revenue."

In removing a case under the foregoing statute although the facts showing removability do not appear in the complaint, such facts may be supplied in the petition for removal. *Gay v. Ruff*, 292 U.S. 25.

Additionally, appellant admits (Br. 7) that "Appellees were acting under color of their official duties."

B. Facts were admitted.

All the facts set forth in the petition for removal (R. 1) were also included in the request for admissions (R. 8) directed to plaintiff, and were deemed admitted under Rule 36, F.R.C.P., upon plaintiff's failure to respond thereto.

At the hearing on the motion for summary judgment plaintiff's counsel stated: "I concede, right to begin with, that in so far as any of the defendants was acting within the scope of his official duties as an employe of the Internal Revenue Department, in so far as any of those activities were pertinent to and a part of his official duties, we have no cause of action against either the defendant or the United States Government." (Tr.

4). Again: "In so far as these employes lawfully attempted to, and did collect moneys owing to the Government, we have no cause of action, and we make no complaint." (Tr. 5). And on the argument of plaintiff's motion for rehearing plaintiff's counsel stated: "I will state right now that if I did not state it then, so far as that phase of it is concerned, I acknowledge, and acknowledge now, that some of the things that the defendants did—not all of them but some of them—were in connection with their acts as employes of the Government. I do not deny that at all." (Tr. 17).

Finally, even in appellant's brief, it is stated: "To clarify and confine the issues appellant will acknowledge — 1. Appellant was indebted to the Government for taxes. 2. The four male appellees were employees of the Internal Revenue Service at the time of the wrongful acts as set forth in the complaint. 3. Appellees were acting under color of their official duties. 4. The Government had the right through its employees to levy upon property of appellant to enforce the payment of her obligations to the Government." (Br. 7).

The record reflects that plaintiff ignored the request for admissions, while neither filing counter-affidavits nor appearing personally at the hearing on the motion for summary judgment. The docket entries (R. 25) show a studied indifference by plaintiff's counsel to raising objections by filing of appropriate papers in the District Court. Indeed, from the moment the removal papers were filed until the Court's opinion was filed, plaintiff's counsel did no more than present oral argument at the

hearing on the motions for summary judgment and dismissal.

C. Immunity from suit.

Since the actions of the four Internal Revenue Service employees were done in relation to, or more or less in connection with, the general matters committed by law to their control and supervision, they are immune from personal liability.

Cooper v. O'Connor, 99 F.2d 135, cert. denied 305 U.S. 643, rehearings denied 305 U.S. 673, 307 U.S. 651.

Spalding v. Vilas, 161 U.S. 483.

Gregoire v. Biddle, 177 F.2d 579 (C.A.2d), cert. denied 339 U.S. 949.

Tinkoff v. Campbell, et al., 86 F.Supp. 331 (D.C. Ill.).

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

C. E. LUCKEY,
United States Attorney for
the District of Oregon,

EDWARD J. GEORGEFF,
Assistant United States Attorney.

January 1958

APPENDIX

Title 28, U.S. Code

Section 1442. *Federal officers sued or prosecuted.*

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * *

United States
COURT OF APPEALS
for the Ninth Circuit

LEWIS C. DOUGALL,

Appellant,

v.

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Appellee.

APPELLEE'S BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE WILLIAM G. EAST, Judge.

FILED

OCT 16 1957

PAUL P. CHIEF, CLERK

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No. 15544

United States
COURT OF APPEALS
for the Ninth Circuit

LEWIS C. DOUGALL,

Appellant,

v.

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Appellee.

APPELLEE'S BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

HONORABLE WILLIAM G. EAST, Judge.

STATEMENT OF THE CASE

Plaintiff appeals from an order of the Oregon district court which denied his motion under Rule 60 of the Federal Rules of Civil Procedure for correction and relief from the judgment of dismissal which was entered on July 11, 1952 (No. 15544, Tr. 18-25). This judgment, which dismissed plaintiff's action under the Federal Employers' Liability Act to recover damages on account of

personal injuries sustained on January 30, 1946, was affirmed by this court on November 5, 1953 (207 F(2d) 843). The United States Supreme Court denied a petition for a writ of certiorari on February 1, 1954 (347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063). Judgment on this court's mandate was entered by Judge Fee on February 23, 1954 (No. 15544, Tr. 15-18).

The motion under Rule 60 F.R.C.P. was filed on November 21, 1956, and the order appealed from was entered on January 15, 1957. Thus, the application was made over four years after the entry of judgment and nearly eleven years after the cause of action accrued.

There is also pending before the court plaintiff's motion filed in April, 1957, for correction and amendment of this court's mandate issued on February 8, 1954. The grounds of this motion are ". . . that this Court was not apprised of the fact that the decision of the District Court was not a final order within the meaning of 28 U.S.C., Sec. 1291, and was not appealable."

Defendant has also filed a motion in this court to strike from the record an affidavit of plaintiff's present counsel which was filed in the court below over three months after the entry of the order appealed from. The ground of this motion is that the affidavit was not a part of the record before the district court and was improperly filed.

This brief will first consider the order denying plaintiff's motion under Rule 60 and will conclude with a discussion of the two other motions pending before the court.

PROCEDURAL RULE INVOLVED

Rule 60 of the Federal Rules of Civil Procedure, entitled "Relief from Judgment or Order," reads as follows:

"(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

"(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a

judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

SUMMARY OF ARGUMENT

1. The district court lacked jurisdiction to grant plaintiff any relief from the judgment of dismissal which had been affirmed by this court, since this court's mandate had not granted the trial court permission to take further proceedings.

2. Since the judgment of dismissal was entered in accordance with the district court's findings of fact and conclusions of law, there was no jurisdiction to entertain the motion for correction and relief under Rule 60 (a) F.R.C.P.

3. Even if plaintiff could have shown valid grounds for relief on account of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct (which we emphatically deny), relief on any of these grounds was barred by the one-year limitation in Rule 60 (b). The plaintiff's attempt to invoke Rule 60 (b)(6) was to no avail where all alleged grounds for relief fell under subdivisions (1), (2) or (3).

4. Even if some basis for relief under Rule 60 (b)(6) had been alleged, more than a reasonable time had elapsed, as a matter of law, between the entry of the judgment and the filing of the motion over four years later.

5. Even if the motion had been timely made, the record clearly shows that plaintiff's former counsel decided to rely solely upon the Federal Employers' Liability Act and abandoned at pretrial the inconsistent theory that plaintiff was an employee of Morrison-Knudsen, Inc., whose remedy against defendant would be under the third-party claim provision of the Workmen's Compensation Act of the State of Washington. Rule 60 (b) was not designed to relieve a party against a calculated and deliberate tactical decision made by his attorney in the course of litigation. In any event, plaintiff can show no abuse of discretion by the court below in denying relief.

6. Defendant's motion to strike from the record the attorney's affidavit filed over three months after the entry of the order appealed from should be sustained since it was not a part of the record on which the order appealed from was made.

7. Plaintiff's motion for correction and amendment of this court's mandate issued on February 8, 1954, is utterly lacking in merit since the judgment of dismissal of July 11, 1952, was an appealable final judgment. Rule 54 (b) of the Federal Rules of Civil Procedure has no application to this action. Furthermore, this court's previous decision on the merits is *res adjudicata* of plaintiff's claim that the 1952 judgment was not appealable.

PRIOR PROCEEDINGS

In view of the charges of fraud in plaintiff's motion (No. 15544, Tr. 23) and the insinuations in plaintiff's brief that defendant's attorneys intentionally overreached the plaintiff and his former attorney, the late Elton Watkins, it is necessary to review the record which demonstrates the complete lack of foundation for these charges.

The complaint was filed on January 25, 1949. Therein plaintiff sought to recover the sum of \$200,000 general damages and \$144,826.70 special damages on account of serious personal injuries he allegedly sustained while he was working on defendant's right of way near Good-nough, Washington, on January 30, 1946. Liability was predicated upon various allegations of common-law negligence, as well as claimed violations of several provisions of the Federal Safety Appliance Acts (No. 15544, Tr. 3-7).

The complaint stated that plaintiff "... brings this action against the defendant under the Federal Employers' Liability Act and the Federal Safety Appliance Act" (No. 15544, Tr. 3). It was further alleged that at the time of injury "plaintiff was in the employ of Railway Company in interstate commerce" (No. 15544, Tr. 4). Diversity of citizenship and requisite jurisdictional amount were also claimed.

Thus, under the complaint it might have been open to the plaintiff (1) to attempt to recover from defendant under the Federal Employers' Liability Act as an employee of defendant, basing liability on negligence and

violations of the Safety Appliance Acts, or (2) to attempt to assert a third-party claim as a nonemployee basing liability on common-law negligence and violations of the Safety Appliance Acts.

The record conclusively shows that at the time of pretrial in the spring of 1952 the late Mr. Elton Watkins, who was plaintiff's attorney from 1947 until his death in 1956, made a calculated and deliberate decision to stake his entire case upon the proposition that plaintiff was an employee of defendant and was therefore entitled to the protection of the Federal Employers' Liability Act, and not to rely upon plaintiff's "third-party" claim as a nonemployee of defendant.

In a proposed pretrial order drafted by Mr. Watkins and served on counsel for defendant on April 17, 1952, (No. 15544, Tr. 29-43) one of plaintiff's contentions under "Issues of Law" was that he would be entitled to recover from defendant ". . . whether plaintiff was an employee of defendant, or an employee of Morrison-Knudsen, Inc., or an invitee of defendant, or as a member of the public" (No. 15544, Tr. 39).

However, this contention was abandoned by Mr. Watkins in the final pretrial order which was agreed upon by counsel after a number of conferences prior to trial in May, 1952 (No. 13492, Tr. 3-13). It was therein provided that jurisdiction of the court was "claimed by plaintiff under and by virtue of the provisions of the Federal Employers' Liability Act, as amended" (Par. III). There were only two issues set up by the parties under "ISSUES OF FACT AND LAW." The first issue

was entitled "I Alleged Liability Under Federal Employers' Liability Act." There were only two subdivisions under this topic: "(A) Right to Maintain Action Under Federal Employers' Liability Act" and "(B) Alleged Liability for Negligence Under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act." Under subtopic (B) the two issues were prefaced as follows: "1. If plaintiff has a right of action under the Federal Employers' Liability Act . . ." and "2. If plaintiff may maintain this action under the Federal Employers' Liability Act . . ." Under the second issue entitled "Damages" it was stated: "1. If plaintiff may maintain this action under the Federal Employers' Liability Act . . ." (No. 13492, Tr. 7-10). Under the court's practice and pursuant to the agreement of the attorneys, the pre-trial order superseded all pleadings (No. 13492, Tr. 13).

Issue I(A) relating to plaintiff's right to maintain his action under the Federal Employers' Liability Act was segregated for separate trial before the court on May 20, 1952. Testimony was taken, exhibits and depositions submitted, arguments made and briefs filed. Judge McColloch took the case under advisement and on May 24, 1952, filed the following opinion (No. 13492, Tr. 16):

"With great respect for experienced counsel, I am unable to distinguish this case from the Norman case, which of course binds me both by comity within this court, and by virtue of supremacy of the appellate court.

I should think that this proceeding might by amendment be converted into a third party proceeding—if plaintiff so desired—but of course both sides would be entitled to be heard as to this.

It seems regrettable that plaintiff should lose his remaining compensation payments. Because compensation payments are so inadequate under present conditions, I believe the modern trend is to give the injured workman control of his third party claim, if one exists, and not to bind him to the harsh doctrine of election.

It may appear to counsel that I am deciding this case hurriedly, but I have in mind plaintiff's interests, and I recall it was stated at the argument that the time was growing short within which plaintiff could renew his compensation claim or perhaps begin third party proceedings."

Mr. Watkins did not adopt the court's pointed suggestion to move for an amendment of the pretrial order and convert this action into a third-party proceeding on the theory that plaintiff was an employee of Morrison-Knudsen, Inc., rather than an employee of defendant. Instead he filed a motion for rehearing. On June 9, 1952, the record was reopened and plaintiff was allowed to introduce additional testimony. After further argument, the court entered an order taking the case under advisement and plaintiff filed a further brief (No. 13492, Tr. 75-91). The court filed its memorandum on the petition for rehearing on June 27, 1952, determining adversely to plaintiff the two controverted issues set up in the pretrial order under Issue I(A) (No. 13492, Tr. 17).

On July 11, 1952, the court entered findings of fact and conclusions of law which in substance determined that at the time of the accident plaintiff was an employee of Morrison-Knudsen, Inc. and not an employee of defendant, and that he was not entitled to maintain the action against the defendant under the Federal Em-

ployers' Liability Act (No. 13492, Tr. 17-24). Paragraph XVI of the findings of fact stated:

"The parties have stipulated and the Court finds that this action is brought solely under the provisions of the Federal Employers' Liability Act, and plaintiff's right to maintain this action is limited by and is to be determined solely in accordance with the provisions of the Federal Employers' Liability Act."

Prior to the date on which the findings and conclusions and the judgment of dismissal were entered, Mr. Watkins filed elaborate exceptions to the proposed findings of fact and conclusions of law, as well as requests for different findings of fact and conclusions of law. However, he did not object to proposed finding XVI (No. 13492, Tr. 25-27).

Following entry of the judgment of dismissal, plaintiff's counsel did not move for a new trial, or to alter or amend the judgment of dismissal under Rule 59, but filed a timely notice of appeal. After the affirmance of the judgment by this court, which noted (1) that the pretrial order limited and tied plaintiff's cause of action to the F.E.L.A. and (2) that another theory of action which plaintiff might have had as a nonemployee "was not advanced in the trial court" (207 F(2d) at p. 848), plaintiff did not even attempt to seek any relief in this court by way of a motion to remand the case to the district court for further proceedings on plaintiff's alleged "third-party" claim. Instead, Mr. Watkins sought a review by the United States Supreme Court, which denied the petition for certiorari, but two justices were of the

opinion that a review should have been granted (347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063).

This court's mandate which was issued on February 8, 1954, and entered in the district court on February 23, 1954, did not grant the trial court permission to take further proceedings herein.

Thereafter, there was no activity in this case until late 1956 when plaintiff's present counsel took charge of this litigation.

Thus, the record clearly demonstrates a deliberate and calculated choice upon the part of plaintiff through his attorney, the late Mr. Watkins, in the spring of 1952, to stake his recovery entirely upon the proposition that he was employed by defendant and therefore entitled to the benefits of the Federal Employers' Liability Act. Although he was given opportunities thereafter to reassert another theory of recovery by plaintiff as an employee of Morrison-Knudsen, Inc., Mr. Watkins concentrated throughout on the one theory of F.E.L.A. liability. He battled plaintiff's cause all the way to the United States Supreme Court, where at least two justices were of the opinion that his cause had sufficient merit to warrant review.

ARGUMENT

- I. The district court lacked jurisdiction to grant plaintiff relief under Rule 60 by way of correction or relief from a judgment which had been affirmed by this court, in the absence of permission by this court.**

The foregoing review of the record is probably unnecessary in view of the terms of this court's mandate which was entered in the district court on February 23, 1954. Thereunder, the district court had no discretion to disturb the judgment of dismissal which had been affirmed. Since this court had not given the district court permission to deviate from its mandate, it follows that the court below lacked the power to accord plaintiff relief under Rule 60.

The leading case so holding is *Home Indemnity Co. v. O'Brien*, 112 F(2d) 387 (C.A. 6). There the district court, following an affirmance of a judgment against a surety company, allowed an amendment to the judgment of interest at 5% from the date of the institution of the suit to the date of judgment. On appeal the order allowing the additional interest was set aside on the ground that the district court lacked power to alter or amend a decision of the court of appeals. The court held (at p. 388):

"It being further the view of this court that subdivision (a) or (b) of rule 60, while enlarging the power of the District Courts over judgments without respect to the running of the term of court, does not confer upon District Courts the power to alter or amend a judgment affirmed by this court or by the Supreme Court of the United States, for such alteration or amendment would be not the correction of a

mistake, judicial or clerical, but an alteration or amendment of a decision of the reviewing court, which it is not within the power of the District Courts to do."

The O'Brien case was followed by the Court of Appeals for the Third Circuit in *Butcher & Sherrerd v. Welsh*, 206 F(2d) 259, cert. den. 347 U.S. 924, 74 S. Ct. 513, 98 L. Ed. 1089, rehearing den. 347 U.S. 940, 74 S. Ct. 626, 98 L. Ed. 1089, rehearing den. 348 U.S. 939, 75 S. Ct. 354, 99 L. Ed. 736, where the court issued a writ of mandamus enjoining the district court from setting aside a judgment which had been affirmed. In that case, permission to apply for such relief had not been obtained from the appellate court and was not given by the mandate. The court rejected the argument that Rule 60(b) gave the district court power to grant relief from such a judgment without the prior approval of the appellate court. The *Welsh* case was cited as a leading case by this court in *Federal Home Loan Bank of San Francisco v. Hall*, 225 F(2d) 349, 372.

In the recent case of *Ginsburg v. Stern*, 242 F(2d) 379, the Third Circuit explained its holding in the *Welsh* case as follows (at p. 380):

"As to the denial by the court below of Ginsburg's motion to file the amended complaint Rule 60(b), Fed. Rules Civ. Proc. 28 U.S.C., not Rule 15(a) as the court below erroneously thought, provides the basis for relief from a final judgment. Ginsburg did not attempt to bring his motion within the purview of Rule 60 (b) but it is not necessary for us to pass on the propriety of the exercise of the discretion of the court below in refusing the motion for leave to file the amended complaint. In *Butcher & Sherrerd v. Welsh*, 3 Cir., 1953, 206 F.2d 259, 262,

we held that when a judgment has been affirmed on appeal and the mandate has gone down it is beyond the power of a lower court to disturb the judgment without leave of the appellate tribunal unless the mandate of the appellate tribunal authorizes it. Cf. *Federal Deposit Ins. Corp., to Use of Secretary of Banking v. Alker*, 3 Cir., 1955, 223 F.2d 262, In *Butcher & Sherrerd v. Welsh*, supra, the relief which the District Court was requested to give in respect to the affirmed judgment was not based on new grounds, grounds which were not and perhaps could not have been presented to the appellate court at the time the appeal was taken.

In the instant case, it is obvious that the grounds for relief presented to the district court by plaintiff's motion could have been raised before this court on the former appeal.

II. Since the judgment of dismissal was entered in accordance with findings of fact and conclusions of law, the district court lacked jurisdiction to grant plaintiff relief under Rule 60(a) on account of a clerical mistake or an error arising from oversight or omission.

Again, the review of the record in this case clearly shows that there was no "clerical mistake" or "error or omission" in connection with the entry of the judgment of July 11, 1952. However, assuming for purposes of argument that there was some mistake or inadvertence, the district court had no power to correct it under Rule 60(a). Of course, since Rule 60(a) carries no time limitation, and permission from this court to correct merely a clerical error probably would be unnecessary, plaintiff's brief lays considerable stress on cases decided under subdivision (a) (App. br. 17-18). However, as shown by

plaintiff's brief, they all involve purely minor typographical and clerical errors or omissions, not of a substantive nature.

On the other hand, the law is clear that where a judgment is entered in accordance with findings of fact and conclusions of law, as was the judgment of July 11, 1952, an omission, or even a serious error therein, does not constitute an error which can be corrected under Rule 60(a).

In *Gray v. Dukedom Bank*, 216 F(2d) 109 (C.A. 6), the district court, purporting to act under Rule 60(a), granted a motion to amend a judgment by adding interest thereto. On appeal, the judgment for interest was reversed on the ground that the omission of interest from the original judgment was not an error which could be corrected under Rule 60(a) since the findings of fact and conclusions of law on which the judgment was entered did not provide for interest.

West Virginia Oil & Gas Co. v. George E. Breece Lbr. Co., 213 F(2d) 702 (C.A. 5), cited by this court in *Jernigan v. Southern Pacific Company*, 222 F(2d) 245, 248, involved an alleged mistake in a compromise settlement and a judgment which had been entered thereon, whereby in dividing leasehold property certain gas producing acreage had been given to the defendants instead of to the plaintiff. Plaintiff contended that the mistake was one which could be corrected by the court at any time under Rule 60(a), but this view was rejected on appeal (at p. 705):

"Applying Rule 60 to the case before us, it is

clear at once, contrary to plaintiff's contention, that the error in the former judgment is not a clerical one. A clerical error is generally defined as an error made by a clerk in transcribing or otherwise. *Marsh v. Nichols, Shepard and Company*, 128 U. S. 605, 9 S. Ct. 168, 32 L. Ed. 538. We are not concerned here with mere error in transcription. A study of the allegations of plaintiff's complaint shows that substantial interest in gas producing property has allegedly been decreed to the wrong litigant. It shows further that the correction is asked not because the judgment does not embody what the court intended and the record justified, but because it does not embody what the parties intended in making up the record. Such a mistake is one of substance which should not be corrected without a substantial showing of equitable right therefore. *Hiawasseo Lumber Co. v. United States*, 4 Cir., 64 F.2d 417."

Similarly in *Ferraro v. Arthur M. Rosenberg Co.*, 156 F(2d) 212, 214, the Court of Appeals for the Second Circuit held, in substance, that deliberate action accurately reflected in the record cannot be denominated a "clerical error" for the purpose of invoking Rule 60(a).

Another example of the narrow scope of Rule 60(a) is found in *Hirsch v. United States*, 186 F(2d) 524 (C.A. 6). In that case, a judgment had been rendered against the federal government in an action to recover income taxes. During the pendency of the appeal, the district court, upon the government's motion and after consideration of new evidence, corrected the judgment by lowering the amount of recovery. The court of appeals, in holding the corrected judgment to be void and invalid, stated that Rule 60(a) was not applicable because the court was "* * * dealing with something other than clerical mistakes."

III. Since the motion for correction and relief from the July 1952 judgment was not filed until November 1956, the district court lacked jurisdiction of the motion even if there had been a satisfactory showing of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or some other misconduct.

Plaintiff takes the alternative view (App. br. 19), that "this particular situation was either caused by a clerical error within the meaning of 60(a) or it was a mistake within the meaning of 60(b)(6)." We have shown that there was no clerical error in connection with the entry of the 1952 judgment. It is equally clear that the district court lacked jurisdiction to consider the motion under Rule 60(b)(6).

Even if it be assumed solely for purposes of argument that the record showed valid grounds of relief from the judgment on account of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or misconduct of an adverse party, the plaintiff was barred from relief under Rule 60(b)(1) and (3) since a motion for relief on these grounds must be made not more than one year after entry of judgment.

Rule 60(b)(6) can only be invoked under the most extraordinary circumstances, and for reasons other than would justify relief under any one of the first five subdivisions of Rule 60(b). Therefore, when a motion purportedly made under Rule 60(b)(6) is, in substance, founded upon grounds included in subdivisions (1), (2) or (3) of Rule 60(b), it is barred by the one-year limitation applicable thereto.

This principle is strikingly illustrated by this court's

decision in *City and County of Honolulu v. United States of America*, 224 F(2d) 573. In that case the city moved the district court more than a year after the entry of a condemnation judgment for relief under Rule 60(b)(6) on the ground that both parties intended that the city should have a water easement which was not excepted from the judgment. On appeal from a judgment dismissing the motion, this court held that the application for relief was based upon no more than a claim of mutual mistake and, therefore, fell under subdivision (1) of Rule 60(b) rather than "any other reason" of Rule 60(b)(6). Judge Denman held (at p. 575):

"Here again we are not concerned with the merits of this contention, for it is apparent that it is based on no more than mutual 'mistake' of paragraph (1) of 60(b) and not on the 'any other reason' of paragraph (6). Since more than a year passed after both the above judgments when the motion was filed the district court was required to dismiss it. *West Virginia Oil and Gas Co. v. George E. Breece Lumber Co.*, 5 Cir., 213 F.2d 702, 706; Cf. *Klapprott v. United States*, 1949, 335 U.S. 601, 613, 69 S. Ct. 384, 93 L. Ed. 266; *United States v. Karahalias*, 2 Cir., 205 F.2d 331, 334."

IV. Even if grounds for relief under Rule 60(b)(6) had been shown, the motion was not made "within a reasonable time," in the absence of any explanation for the delay.

Plaintiff's motion was filed over four years after the entry of judgment, and thirty-three months after the entry of this court's mandate. The plaintiff has offered no explanation whatsoever for this long delay. Therefore, assuming only for purposes of argument that plaintiff could bring himself under Rule 60(b)(6), the motion

was not made "within a reasonable time" and denial was proper on that ground alone. While plaintiff's brief (App. br. 14) states that there is no time limit with respect to Rule 60(b)(6), it cannot be denied that the phrase "within a reasonable time" has been given a strict construction by the courts.

This court's decision in *Morse-Starrett Products Co. v. Steccone*, 205 F(2d) 244 (C.A. 9), is controlling. In that case a motion was made under Rule 60(b), twenty-two months after the entry of the original judgment, and there was no sufficient explanation for the delay. In holding that the district court properly denied the motion, Judge Orr held (at p. 249):

"Mr. Steccone has suggested that rule 60(b)(6) was intended to broaden the power of the federal courts to give relief from judgments; that therefore the principle of the *Swift & Co.* case is no longer applicable. The provisions of rule 60(b)(6) were not intended to benefit the unsuccessful litigant who long after the time during which an appeal from a final judgment could have been perfected first seeks to express his dissatisfaction. The procedure provided by rule 60(b) is not a substitute for an appeal.

* * * * *

"Finally we note that rule 60(b) requires that a motion for relief from judgment be made 'within a reasonable time.' The present motion was filed on November 16, 1951, twenty-two months after the entry of the original judgment. No sufficient explanation has been given as to why Mr. Steccone delayed so long in seeking the relief he now requests. Hence, under the circumstances, it cannot be said that the motion was made 'within a reasonable time.' Cf. *Gilmore v. Hinman*, 1951, 89 U. S. App. D. C. 165, 191 F.2d 652; *Cromelin v. Markwalter*, 5 Cir., 1950, 181 F.2d 948."

Other courts of appeal have held that motions under Rule 60(b)(6) were not made "within a reasonable time" in the following cases: *Gilmore v. Hinman*, 191 F(2d) 652 (C.A.D.C.) [delay of sixteen months]; *Cromelin v. Markwalter*, 181 F(2d) 948 (C.A. 5) [delay of fourteen months]; *Bowles v. J. J. Schmitt*, 170 F(2d) 617 (C.A. 2) [delay of over two years]; *Jurin v. Wiltshire Parkway, Inc.*, 238 F(2d) 263 (C.A.D.C.) [delay of sixteen months].

V. Rule 60(b) was not designed to relieve a party from a free and deliberate decision made by his attorney in the course of litigation.

Even if plaintiff's motion for correction and relief had been timely made, the record clearly shows that the late Mr. Elton Watkins, who was plaintiff's counsel from 1947 until his death in 1956, decided at pretrial to rely solely upon the Federal Employers' Liability Act and, in effect, made an election to abandon the inconsistent theory that plaintiff was an employee of Morrison-Knudsen, Inc., the remedy against defendant being under the third-party claim provisions of the Washington workmen's compensation statutes. The latter claim, which was set up in the first draft of pretrial order (No. 15544, Tr. 39), was eliminated from the final pretrial order, which was limited to plaintiff's cause of action under the Federal Employers' Liability Act. It is clear that both under Rule 16 governing pretrials and under Rule 60(b), the pretrial order was and is binding upon the plaintiff. Obviously, one of the main purposes of pretrial procedure is to limit the issues to be tried, and to

define exactly the theories of recovery and defense. (*Fowler v. Crown Zellerbach Corp.*, 163 F(2d) 773 (C.A. 9), and see discussion by Judge Fee in *Clark v. United States*, 13 F.R.D. 342, 345 (D.C. Or.).) As Judge Fee stated in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 17 F.R.D. 52, 55 (D.C. Or.): "The pre-trial order must after trial be binding upon all parties, as a judicial necessity." Similarly, this court has held that theories not raised and presented in the pretrial order were waived (*Frank v. Giesy*, 117 F(2d) 122, 126-127 (C.A. 9), and see 22 A.L.R. (2d) 599 et seq., *Binding Effect of Court's Order Entered After Pretrial Conference.*")

In passing, it might be helpful to the court to review some of the considerations which undoubtedly were in Mr. Watkins' mind at the time of pretrial and which influenced his decision to stake plaintiff's case solely on the F.E.L.A. liability. In the first place, the advantages of being under the F.E.L.A. were obvious: (1) assumption of risk would be no defense; (2) contributory negligence would not bar recovery but only diminish damages, and, if a violation of the Safety Appliance Acts contributed to the injury, then contributory negligence would not be a defense at all; (3) the plaintiff would have the advantage of the liberal doctrines of liability enunciated by the Supreme Court in F.E.L.A. cases.

However, it may not have been so much the advantages of F.E.L.A. coverage as the obstacles to recovery in a "third-party" action which prompted the plaintiff's counsel to rely exclusively on a claim under the F.E.L.A.

First of all, in a "third-party" action against defendant on the theory that he was an employee of Morrison-Knudsen, Inc., contributory negligence and assumption of risk could have been asserted as complete defenses against the plaintiff.

More important was the statute of limitations problem. This action had been filed just barely within the three-year limitation period of the F.E.L.A., but beyond the Oregon two-year period governing an action for an injury to the person or rights of another, not arising on contract (ORS 12.110(1)). While plaintiff's present counsel may now claim that the Oregon six-year statute (ORS 12.080(2)) would have governed on the ground that reliance upon violations of the Federal Safety Appliance Acts would make this "* * * an action upon a liability created by statute other than a penalty or forfeiture," there was a real problem presented in view of the long line of decisions by the United States Supreme Court that the Safety Appliance Acts do not create, prescribe the measure of, or govern the enforcement of the liability arising from their breach. (*Gilvary v. Cuyahoga Valley R. Co.*, 292 U.S. 57, 54 S. Ct. 573, 78 L. Ed. 1123; *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 54 S. Ct. 402, 78 L. Ed. 755; *Tipton v. A. T. & S. F. Ry. Co.*, 298 U.S. 141, 56 S. Ct. 715, 80 L. Ed. 1091; *Fairport P. & S. R. R. Co. v. Meredith*, 292 U.S. 589, 54 S. Ct. 826, 78 L. Ed. 1446.) Thus, the Oregon Supreme Court decision of *Shelton v. Paris*, 199 Or 365, 261 P(2d) 865, would have required the court below to apply the Oregon two-year statute to plaintiff's claim as a nonemployee, where the court's jurisdiction was based upon diversity of citizenship.

However, there was another more serious obstacle to recovery by the plaintiff if he attempted to sue the defendant on the theory that he was employed by Morrison-Knudsen, Inc., at the time of the accident. It was admitted in the pretrial order (No. 13492, Tr. 6) that following the accident the Department of Labor and Industries of the State of Washington had paid to plaintiff or for his account a total of \$8,690.71 in accordance with the payment schedules of the Washington Workmen's Compensation Act. Thus, any common-law cause of action against a third party which plaintiff might have had was assigned to the State of Washington pursuant to § 51.24.010, Revised Code of Washington (*Anderson v. Bauer*, 146 Wn. 594, 264 P. 410 (Sup. Ct. Wn.); *Arthur v. City of Seattle*, 137 Wn. 228, 242 P. 16 (Sup. Ct. Wn.); *State v. Starr*, 185 Wn. 18, 52 P(2d) 897 (Sup. Ct. Wn.); *Kidder v. Marysville & A. Ry. Co.*, 160 Wn. 471, 300 P. 170 (Sup. Ct. Wn.)).

It is particularly significant that in March, 1950, the State of Washington moved for leave to intervene as a plaintiff in this action. The verified petition stated that plaintiff had elected to take under the Washington Workmen's Compensation Act and had assigned any and all claims against third parties to the State of Washington (No. 15544, Tr. 10).

On July 31, 1950, Judge Fee denied the motion but with leave to renew if other grounds could be shown (No. 15544, Tr. 11). Judge Fee stated in part: "Here it is doubtful whether the cause originally was properly filed, as the statute of Washington may have vested that sovereignty with complete ownership of the cause of ac-

tion, including the power to settle or compromise [citations]. If the plaintiff has no power to institute the action or capacity to maintain it, the Court should not permit intervention." (Def. Ex.)

In making this decision, Judge Fee obviously had in mind the fundamental legal premise that if plaintiff could come within the protection of the F.E.L.A., then his federal cause of action could not in any way be affected or changed by the Washington Workmen's Compensation Act (see *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 395). However, the court realized that whether plaintiff was an employee of defendant or of Morrison-Knudsen, Inc., could not be determined until the trial.

Thus, with the additional obstacles to plaintiff's recovery as a nonemployee of (1) common-law defenses, (2) the two-year Oregon statute of limitations, (3) assignment by operation of law of any cause of action to the State of Washington, it is easy to understand why Mr. Watkins decided to abandon the nonemployee theory and why he elected to concentrate solely upon the F.E.L.A. theory.

This litigation ended nearly four years ago when the United States Supreme Court denied plaintiff's petition for a writ of certiorari. Plaintiff has shown no reason whatsoever why the finality of the judgment herein should be overthrown.

Thus, this case is analogous to *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207. There it was held that plaintiff could not invoke Rule 60(b)(6)

to set aside a judgment canceling his certificate of naturalization where he could have filed a timely appeal from the judgment, but took the erroneous advice of a government official and decided not to appeal. Mr. Justice Minton wrote in part (340 U.S. at p. 198):

"Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

VI. The court should allow defendant's motion to strike from the record an affidavit of plaintiff's counsel filed long after the entry of the order appealed from.

The affidavit (No. 15544, Tr. 28-29) sought to be stricken from the record was filed without the permission of the district court. More important, it was not a part of the record before the court at the time of the entry of the order appealed from. It was filed over three months later.

It is a basic rule of appellate procedure that a case must be reviewed by the court of appeals solely upon the record made before the district court. Therefore extraneous evidence or documents not a part of the record before the trial court, but filed at a later date, will be stricken from the records in the appellate court. Examples of the application of this rule are found in such

decisions of this court as *Kennedy v. United States*, 115 F(2d) 624; *Heath v. Helmick*, 173 F(2d) 156; *United States v. Goggins*, 187 F(2d) 531, and *Lee Shew v. Brownell*, 219 F(2d) 301.

VII. Plaintiff's motion for correction and amendment of this court's mandate is completely lacking in merit and should be denied.

Plaintiff has filed in this court a motion for correction and amendment of the court's mandate "* * * on the grounds and for the reason that the decision of the District Court was not a final order within the meaning of 28 U.S.C. Sec. 1291, and was not appealable."

That this motion is completely lacking in merit is readily apparent from the foregoing discussion of prior proceedings in this action.

The judgment entered on July 11, 1952 (No. 13492, Tr. 28) dismissed and terminated this action in the district court. It was entered upon findings of fact and conclusions of law which determined that plaintiff was not an employee of the defendant and could not maintain suit under the F.E.L.A. Conclusion of Law V stated in part, "The action therefore should be dismissed" (No. 13492, Tr. 24). As noted above, the trial court in its findings determined that the action was "brought solely under the provisions of the Federal Employers' Liability Act, and plaintiff's right to maintain this action is limited by and is to be determined solely in accordance with the provisions of the Federal Employers' Liability Act" (No. 13492, Tr. 23). Thus, this was not a case involving multiple claims, and Rule 54 (b) of the Federal Rules of

Civil Procedure could have had no possible application. (*Steiner v. 20th Century-Fox Film Corporation*, 220 F(2d) 105 (C.A. 9), and see cases collected at 38 A.L.R. (2d) 377, 383-386.)

Furthermore, the decision of this court which affirmed the final judgment on the merits would appear to be conclusive. Even though no objections were raised by the parties, it was the duty of this court under its decisions to have raised the jurisdictional objections on its own motion and to have dismissed the 1952 appeal if the judgment of dismissal was not final and appealable. (*City and County of San Francisco v. McLaughlin*, 9 F(2d) 390 (C.A. 9); *Robinson v. Elder*, 78 F(2d) 817 (C.A. 9); *Cutting v. Bullerdick*, 188 F(2d) 837, 839 (C.A. 9); *Van Buskirk v. Wilkinson*, 216 F(2d) 735 (C.A. 9)). Thus, the question of the court's jurisdiction to entertain the former appeal was directly in issue and was necessarily decided by the court. Since this court possessed jurisdiction to decide that it had jurisdiction, its decision on the merits is *res adjudicata* as to the finality of the judgment of dismissal. The law on this question was fully reviewed by this court in *O. F. Nelson & Co. v. United States*, 169 F(2d) 833 (C.A. 9), which is directly in point. In that case, the court denied a motion made in 1948 to recall mandates and dismiss appeals which the court had affirmed on the merits in 1945, on the ground that the previous decision on the merits was *res adjudicata* as to the finality of the decrees appealed from.

In support of the motion for correction and amendment of mandate, plaintiff relies upon the decisions of

this court in *Bergman v. Aluminum Lock Shingle Corp.*, 237 F(2d) 386 (C.A. 9), and *Walter W. Johnson Co. v. Reconstruction Finance Corp.*, 223 F(2d) 101 (C.A. 9). However, these cases involving the application of Rule 54(b) F.R.C.P. to judgments or decrees in actions containing multiple independent claims give no support to plaintiff's motion. As we have noted, the problem of multiple claims was not presented in the trial of the case at bar.

In the *Bergman* case, one claim of patent infringement and another independent claim of unfair competition were asserted. The pretrial order segregated the issue of patent validity and infringement but expressly stated that all proceedings pertaining to all of the other issues be deferred until the trial and determination of the segregated issues. An appeal was taken from a decree which found in favor of Aluminum Lock on validity and infringement, granted a permanent injunction, and ordered an accounting. The decree did not comply with Rule 54(b), and it affirmatively stated that the court reserved jurisdiction of all issues, claims and counterclaims raised by the complaint and defendant's counterclaim for unfair competition. On its own motion, this court dismissed the appeal on the ground that the independent claims of unfair competition made by both sides had not been adjudicated, and that the decree was not final and appealable.

In the *Walter W. Johnson Co.* case, the judgment appealed from merely dismissed the counterclaims. It did not adjudicate two independent claims in the complaint, and there was no compliance with Rule 54(b).

CONCLUSION

We cannot conclude without commenting upon the improper attempt by plaintiff's attorney to convey the false impression to the court that plaintiff is without remedy and has only received "a small preliminary initial allowance" from the Department of Labor and Industries of the State of Washington, which he had been called upon to refund (App. br. 27).

The court will note that it was stipulated in the May 1952 pretrial order that payments of \$8,690.70 had been made to plaintiff and for payment of his hospital and doctor bills (No. 13492, Tr. 6). There is, of course, nothing in the record to show what further payments have been made to plaintiff in the intervening period of over five years.

This court's decision and the denial by the United States Supreme Court of the petition for certiorari determined once and for all that plaintiff was an employee of Morrison-Knudsen, Inc., rather than an employee of defendant. The record shows that the Department of Labor and Industries had taken the position that if plaintiff could prove he was defendant's employee and made a recovery against defendant, then he would have to refund the benefits he had received under workmen's compensation (No. 13492, Tr. 89). Quite naturally, the State of Washington backed up this position as *amicus curiae* in a brief and oral argument before this court. However, its contention was rejected (207 F(2d) 843), and ever since the denial of the petition for certiorari,

the State of Washington has not even had a colorable claim against plaintiff to recover back compensation payments. In fact, since that date plaintiff has been certain of collecting whatever additional compensation benefits were allowable under the Washington statutes.

Thus, the court must presume that the Washington officials have accorded to plaintiff all of the compensation benefits to which he would be entitled.

Finally, we wish to refute the repeated assertions in plaintiff's brief that this is a case of absolute liability under the Safety Appliance Act.

While the equipment in question which defendant permitted to be operated on its lines by Morrison-Knudsen, Inc., may have been in violation of several provisions of the Safety Appliance Act, still there were many other issues to be tried in a third-party suit by plaintiff brought under the Workmen's Compensation Act of Washington. These included the factual issues of proximate cause, contributory negligence and assumption of risk, and the legal defenses of the statute of limitations, and assignment of plaintiff's third-party claim to the State of Washington.

Defendant's case on these factual issues of proximate cause, contributory negligence and assumption of risk would depend upon the testimony of a group of plaintiff's fellow workers who were at the scene of the accident on January 30, 1946. The witnesses were employed by Morrison-Knudsen, Inc., and were not under defendant's control. The difficulties which defendant would now encounter in attempting to locate and obtain their testi-

mony is obvious. For plaintiff's counsel to argue that
 “* * * defendant will suffer no conceivable prejudice
 because the matter has not been presented at an earlier
 date” (App. br. 19) is most unrealistic, to say the least.

In essence, plaintiff's position is that he has a new
 attorney who believes that the prior litigation should
 have been conducted differently, and wants this court
 to set aside a binding pretrial order made over five years
 ago. On this record, Judge Healy's observation in *Frank*
v. Giesy, 117 F(2d) 122, 127, is particularly pertinent:

“Where the pretrial procedure is resorted to the
 spirit of the procedure must be observed.”

The order denying plaintiff's motion for correction
 and relief from the judgment of July 11, 1952, should be
 affirmed; and plaintiff's motion for correction and
 amendment of the court's previous mandate should be
 denied.

Respectfully submitted,

CLEVELAND C. CORY,
 Attorney for Appellee

HART, SPENCER, MCCULLOCH,
 ROCKWOOD & DAVIES,
 1410 Yeon Building,
 Portland 4, Oregon,
 Of Counsel.

No. 15546

**United States
Court of Appeals**
for the Ninth Circuit

BERT RUUD and EMMA RUUD,

Appellants,

vs.

UNITED STATES of AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Idaho,
Eastern Division.**

FILED

JUL 29 1957

PAUL P. O'BRIEN, CLERK

No. 15546

**United States
Court of Appeals**
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Attorney,
Boise, Idaho,
Attorneys for Appellee.

United States District Court for the District Court
of Idaho, Eastern Division

No. 1883

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1001.99 ACRES OF LAND, More or Less, in the
County of Bonneville, State of Idaho; BERT
RUUD and EMMA RUUD, also Known as
EMMA T. RUUD, His Wife; AMERICAN
PACKING PRODUCE CO., REUEL CALL,
EARL FORD, LESTER RUUD, NIHLA
JESSEN, ALBERT L. JESSEN, ROBERT
MORRIS, GEORGE D. KEYSER, JEAN M.
KEYSER, COUNTY OF BONNEVILLE in
the State of Idaho; ANY AND ALL UN-
KNOWN OWNERS,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America at the request of the Acting Solicitor, Department of the Interior, for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat.

1421, 40 U.S.C., 1946 ed., Section 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved June 17, 1902 (32 Stat. 388), and all acts amendatory thereof or supplementary thereto, commonly known as the Federal Reclamation Laws, including without limitation and by this enumeration the Reclamation Project Act of 1939 (53 Stat. 1187), and the Act of September 30, 1950 (64 Stat. 1083), and the Interior Department Appropriation Act, 1955 (Public Law 465, 83d Congress), and by further acts of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C., 1946 ed., Supp. IV, Section 257), as amended, and February 26, 1931 (46 Stat. 1421; 40 U.S.C., 1946 ed., Secs. 258a-258e), and acts amendatory thereof or supplementary thereto.

3. The use for which the property is to be taken is in connection with the Palisades Project of the Bureau of Reclamation, United States Department of the Interior, to provide for the construction, operation and maintenance of the Palisades Dam and Reservoir, a Federal Reclamation project, for regulating the flow of the Snake River, a tributary of the Columbia River, for controlling floods, improving navigation, providing for storage and the delivery of the stored waters thereof in connection with the reclamation of arid and semi-arid lands including public lands and lands of Indian Reservations; and the generation, distribution and sale of electric energy as a means of financially aiding such undertakings.

4. The estate hereby taken for said public uses is the full fee simple title thereof, subject to any presently used rights of way for highways, roads, telephone, and power lines created in favor of the public or public utilities.

5. The property so to be taken is situated in the County of Bonneville, State of Idaho, and is more particularly described in Exhibit "A" attached hereto.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

Bert Ruud and Emma Ruud, also known as Emma T. Ruud, his wife; American Packing Produce Co., Renel Call, Earl Ford, Lester Ruud, Nihla Jessen, Albert L. Jessen, Robert Morris, George D. Keyser, Jean M. Keyser.

7. The County of Bonneville may have or claim an interest in the property by reason of taxes and assessments due and eligible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Any and All Unknown Owners."

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensa-

tion for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

/s/ SHERMAN F. FUREY, JR.,
United States Attorney.

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ SHERMAN F. FUREY, JR.,
United States Attorney.

EXHIBIT "A"

The land which is the subject matter of the Declaration of Taking filed herein is situate in the County of Bonneville, State of Idaho, and is more particularly described as follows:

Tract No. 34

A tract of land containing two (2.00) acres located in Lot two (2), section one (1), township two (2) south, range forty-five (45) east, Boise Meridian, Idaho, more particularly described by metes and bounds as follows:

Beginning at the northeast corner of lot two (2) of said section one (1); running thence south along the east boundary of said Lot two (2) 295.16 feet; thence west parallel to the north boundary of said Lot two (2) 295.16 feet;

thence north parallel to the east boundary of said Lot two (2) 295.16 feet to the north boundary; thence east along the north boundary of said Lot two (2) 295.16 feet to the point of beginning.

Tract No. 41

A tract of land containing six hundred seventy-one and 12/100 (671.12) acres, more or less, in sections one (1), twelve (12) and thirteen (13), township two (2) south, range forty-five (45) east, Boise Meridian, and in section eighteen (18), township two (2) south, range forty-six (46) east, Boise Meridian, Idaho, described as follows:

Lot one (1), Lot two (2), excepting therefrom the tract heretofore described as Tract No. 34, the southwest quarter of the northeast quarter ($SW\frac{1}{4} NE\frac{1}{4}$), and the west half of the southeast quarter ($W\frac{1}{2} SE\frac{1}{4}$) of section one (1); Lot three (3), Lot four (4), Lot seven (7), the west half of the northeast quarter ($W\frac{1}{2} NE\frac{1}{4}$), and the northeast quarter of the northwest quarter ($NE\frac{1}{4} NW\frac{1}{4}$) of section twelve (12); Lot one (1), Lot four (4), Lot five (5), the west half of the northeast quarter ($W\frac{1}{2} NE\frac{1}{4}$), the southeast quarter of the northeast quarter ($SE\frac{1}{4} NE\frac{1}{4}$) and the northeast quarter of the southeast quarter ($NE\frac{1}{4} SE\frac{1}{4}$) of section thirteen (13), all in township two (2) south, range forty-five (45) east, Boise Meridian, Idaho; and that portion of the northwest quarter of the southwest quarter ($NW\frac{1}{4} SW\frac{1}{4}$) of section eight-

een (18), township two (2) south, range forty-six (46) east, Boise Meridian, Idaho, more particularly described by metes and bounds as follows:

Beginning at the southwest corner of the northwest quarter (NW $\frac{1}{4}$) of said section eighteen (18); thence south 27° 45' east a distance of 1495.0 feet to a point of intersection with the south boundary of the northwest quarter of the southwest quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$); thence west along the south boundary a distance of 700.0 feet to the southwest corner of the northwest quarter of the southwest quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$); thence north along the west boundary of said section eighteen (18), a distance of 1320.0 feet to the point of beginning.

Tract No. 77

A tract of land containing three hundred and twenty-eight and 87/100 (328.87) acres, more or less described as follows:

The southeast quarter (SE $\frac{1}{4}$) of section four (4); the northeast quarter of the northeast quarter (NE $\frac{1}{4}$ NE $\frac{1}{4}$) of section nine (9); Lot two (2); the northwest quarter of the northwest quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of section ten (10), all in township three (3) south, range forty-six (46) east, Boise Meridian, Idaho; and Lot one (1) of said section ten (10), township three (3) south, range forty-six (46) east, Boise Meridian, excepting therefrom that portion containing 0.23 acres, more or less, described by metes and bounds as follows:

Commencing at the meander corner on the east bank of Snake River which point is a quartz boulder mark "M.C." on the south face established July 26, 1900, on the Idaho-Wyoming boundary line lying north 3848.5 feet from the closing corner of sections ten (10) and fifteen (15), township three (3) south, range forty-six (46) east, Boise Meridian, as measured by the aforementioned survey; thence north $0^{\circ} 17'$ east a distance of 1055.5 feet along the east boundary of said Lot one (1); thence west 50.0 feet to the point of beginning which point lies northerly from the northeast corner of a certain frame building with concrete foundation, said foundation corner acclaimed as lying on the west boundary of the right of way of U. S. Highway No. 26; thence west 100.0 feet; thence south 100.0 feet; thence east 100.0 feet; thence north 100.0 feet to the point of beginning.

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Cause.]

**MOTION TO DISMISS ARCHIE HILL AND
ZOLA M. HILL, HIS WIFE, AS PARTIES
DEFENDANT**

Plaintiff moves the Court that Archie Hill and Zola M. Hill, his wife, defendants in the above matter, be dismissed from this action on the ground that

said persons have no compensable interest in the property herein condemned.

This motion is made and based upon the pleadings, files, interrogatories, answers to interrogatories filed heretofore, and the brief of plaintiff filed herewith.

/s/ SHERMAN F. FUREY, JR.,
United States Attorney for
the District of Idaho.

Affidavit of mail attached.

[Endorsed]: Filed November 2, 1955.

[Title of District Court and Cause.]

MOTION TO AMEND BY INTERLINEATION

Comes now the United States of America, petitioner above named, and moves for an appropriate order of this court making Archie Hill and Jane Doe Hill, his wife, parties defendant by interlineation.

/s/ SHERMAN F. FUREY, JR.,
United States Attorney.

Order

It Is So Ordered.

Dated this 4th day of October, 1955.

/s/ CHASE A. CLARK,
Chief Judge, United States
District Court.

[Endorsed]: Filed October 4, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the fair market value of certain property described in the Complaint as Tracts No. 77, No. 41, and No. 34, as of the date of taking, March 4, 1955, including improvements thereon, to be the sum of \$171,400.00.

/s/ T. M. MORRIS,
Foreman.

[Endorsed]: Filed November 15, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendants Bert Ruud and Emma Ruud, his wife, move the Court to set aside the verdict of the jury returned herein on the 15th day of November, 1955, and the judgment entered thereon, and to grant a new trial on the following grounds:

1. The Court erred in refusing to hear arguments and rule on plaintiff's Motion to Dismiss as to the defendants Archie Hill and Zola M. Hill, his wife, prior to the selection of the jury, and by refusing to act on said motion prior to the selection of the jury. Counsel for defendants Archie Hill and Zola M. Hill, his wife, was permitted to and did

participate in the selection of the jury, when Archie Hill and Zola M. Hill, his wife, had no compensable interest in the outcome of the suit.

2. The Court erred in stating to the jury just prior to the taking of testimony in the case that "the other defendants in this case have all been eliminated from this trial and that the other parties have all—are all out of the case." Said statement on the part of the Court was an indication to the jury that the other defendants had settled their claims, and that Bert Ruud and Emma Ruud were the only parties contesting the issue of just compensation.

3. The Court erred in refusing to permit Preston Ellsworth, a competent witness for the defendants, to give an opinion as to the highest and best use to which the Bert Ruud Home Ranch, Tract 41, could be put on the 4th day of March, 1955.

4. The Court erred in refusing to permit Preston Ellsworth, a competent witness for the defendants, to give his opinion as to the fair market value of the farm lands involved in this action.

5. The Court erred in refusing to permit D. Worth Smith, a competent witness for the defendants, to give an opinion as to the highest and best use to which the tracts of farm land involved in this suit could be put on March 4, 1955.

6. The Court erred in refusing to permit D. Worth Smith, a competent witness for the defend-

ants, to give an opinion as to the fair market value of the farm lands involved in this action on the 4th day of March, 1955, the date of taking.

7. The Court erred in requiring that every witness testifying as to "highest and best use" of the properties involved in this action be qualified as an expert real estate appraiser.

8. The Court erred in requiring that every witness testifying as to the "fair market value" of the farm land involved in this action be qualified as an expert real estate appraiser.

9. The Court erred in refusing to permit farmers, who for many years were familiar with the productivity of the farm lands involved in this suit, and who for many years were familiar with and who knew farm land values where the lands in question are located, from testifying as to the "highest and best use" to which the farm lands in question could be put on March 4, 1955, the date of taking, and from testifying as to the fair market value of said farm lands on said date of taking.

10. The verdict is inadequate and appears to have been given under the influence of passion and prejudice.

11. The verdict is contrary to law.

12. The verdict is contrary to the evidence.

13. The verdict is contrary to the weight of the evidence.

14. The verdict is contrary to law and evidence.

This motion is based upon the records and proceedings in this action.

HOLDEN & HOLDEN,

By /s/ WILLIAM S. HOLDEN,
A Member of the Firm, Attorneys for Defendants
Bert Ruud and Emma Ruud.

Affidavit of mail attached.

[Endorsed]: Filed November 25, 1955.

United States District Court for the District of
Idaho, Eastern Division

No. 1883-E

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1001.99 ACRES OF LAND, More or Less, in the
County of Bonneville, State of Idaho, et al.,

Defendants.

JUDGMENT

(Tracts 41, 77 & 34)

This Cause came on regularly for trial on the 7th day of November, 1955, before the Honorable Chase

A. Clark, presiding Judge, and it appearing to the satisfaction of the Court from the records and files and from the evidence submitted herein:

I.

That on March 4, 1955, a Complaint, together with a Declaration of Taking, was filed herein; and there was deposited in the registry of the court the sum of \$152,250.00 as estimated compensation for the estate taken in Tracts Nos. 41, 77 and 34.

II.

That the estate taken is the full fee simple title, subject to presently used rights of way for highways, roads, telephone and power lines created in favor of the public or public utilities; that the property involved in this action is described as Tracts 41, 77 and 34, for a more particular description of which reference is hereby made to the Declaration of Taking filed herein.

III.

That the Secretary of the Interior has found and determined that it is necessary and advantageous to acquire Tracts 41, 77 and 34 in connection with the construction and maintenance of the Palisades Dam and Reservoir.

IV.

That, at the time of the filing of the Declaration of Taking, fee simple title to said tracts was vested

in Bert Ruud and Emma Ruud, also known as Emma T. Ruud, his wife, and George D. Keyser and Jean M. Keyser, his wife; that Robert Morris appeared personally at the time said case was called for trial, claiming an interest in said property by virtue of a lease of the mineral rights in said property given him by Bert Ruud; that thereafter, Robert Morris, Bert and Emma Ruud, and the United States of America, through the United States Attorney, entered into a stipulation, filed herein, wherein it was agreed that, in addition to any award given for the above premises by the jury, the sum of \$750.00, without interest, might be given to Robert Morris in full settlement of any damage which might have been sustained by Robert Morris by the condemnation of the above premises; that George D. Keyser and Jean M. Keyser, his wife, failed to appear either personally or by attorney; that evidence was introduced at the trial, establishing to the Court's satisfaction that Bert and Emma Ruud have held uninterrupted and adverse possession of Tract 34 for more than twenty years immediately last past and have during all of said time held such possession of said tract under a claim of right and have during all of said time paid the taxes on said tract; that American Packing Produce Company filed its Disclaimer of Interest herein and failed to enter any appearance at the trial; that all of the aforementioned parties were duly served according to law, and the time within which each could have filed an Answer having expired prior to

November 7, 1955, a default against each was duly entered on said date; and Reuel Call, Earl Ford, Lester Ruud, Nihla Jessen and Albert L. Jessen having been duly served in this matter and the time within which an Answer or other pleading could be filed having expired prior to November 7, 1955, and said parties having failed to appear in this action either personally or by attorney, and it appearing to the Court that said last named parties and George D. Keyser and Jean M. Keyser have no compensable interest in the property involved in this action; and Archie M. and Zola Hill having appeared at the time said case came on for trial, both personally and through their attorney, A. A. Merrill, and the said Archie and Zola M. Hill having upon motion of the United States of America, been dismissed from this action for the reason that they have no compensable interest therein, the Court therefore holds that Bert Ruud and Emma Ruud, also known as Emma T. Ruud, his wife, are the only parties entitled to recover for the taking of each of the three tracts referred to above, except Bonneville County, Idaho, which has a lien for general taxes.

V.

That a jury of twelve members and one alternate was duly empanelled, viewed the land, heard all testimony relating to the issue of just compensation for the taking of Tracts 41, 77 and 34 on March 4, 1955, and returned its verdict on November 15, 1955, in the sum of \$171,400.00; that there was deposited

by plaintiff with the Clerk of the above Court the sum of \$152,250.00, which, together with the \$750.00 which it was agreed should be added to any award made herein, leaves a deficiency in the sum of \$19,900.00

Now, Therefore, by reason of the law and the premises,

It Is Ordered, Adjudged, and Decreed:

VI.

That the use for which the lands or interests therein were taken is a public use and that the taking by eminent domain is duly authorized by the Acts of Congress set forth in the Complaint filed herein.

VII.

That the full fee simple title over Tracts 41, 77 and 34 vested in the United States of America upon the filing of a Declaration of Taking on March 4, 1955, free and clear of all liens or encumbrances.

VIII.

That, as of March 4, 1955, the just compensation, including all damages sustained by reason of the taking of the property rights hereinabove described, is the sum of \$171,400.00, plus \$750.00 for the damages to Robert Morris stipulated and agreed to by the United States of America and all other parties concerned, or a total of \$172,150.00, it being

further ordered that, in accordance with the stipulation heretofore referred to, the sum of \$750.00 added to said award of the jury shall draw no interest.

IX.

That the United States of America shall pay into the registry of the court for the benefit of the person or persons entitled thereto the sum of \$19,900.00, plus interest at 6% per annum on the sum of \$19,150.00 from March 4, 1955, until paid.

X.

That the Clerk of this court is hereby authorized, empowered and directed to pay to Bert Ruud and Emma Ruud, also known as Emma T. Ruud, his wife, and Bonneville County, Idaho, the sum of \$152,250.00 now on deposit in the registry of this court, and upon receipt of the deficiency in the amount of \$19,900.00, the Clerk of this court shall pay from said deficiency to Bert Ruud, Emma Ruud, also known as Emma T. Ruud, and Bonneville County, Idaho, the sum of \$19,150.00, together with interest thereon at the rate of 6% per annum from the 4th day of March, 1955, until so paid; and the Clerk is further authorized to pay the balance of said deficiency in the sum of \$750.00, without interest, to Robert Morris.

Jurisdiction is retained for such further orders as may be necessary and proper.

Dated this 15th day of December, 1955.

/s/ CHASE A. CLARK,
Chief Judge,
U. S. District Court.

[Endorsed]: Filed December 15, 1955.

[Title of Cause.]

MINUTES OF THE COURT NOV. 26, 1956

This cause came on regularly this date in open court on defendant Ruud's Motion for a new Trial; Sherman F. Furey, Jr., appearing as counsel for the Government and William Holden and Vernon Kidwell, appearing as counsel for the defendant.

After hearing counsel for the respective parties, the Motion for a new trial was overruled by the Court.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that Bert Ruud and Emma Ruud, his wife, two of the defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 15th day of November, 1955, and from the order denying new trial entered in this action on the 26th day of November, 1956.

Dated at Idaho Falls, Idaho, this 18th day of January, 1957.

HOLDEN & HOLDEN,

By /s/ WILLIAM S. HOLDEN,

Attorneys for Appellants.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That the United States Fidelity & Guaranty Company, a corporation, organized and existing under the laws of the State of Maryland and duly licensed to transact business in the State of Idaho is held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Two Hundred Fifty & no/100 Dollars (\$250.00), to be paid to the said plaintiff, its successors and assigns, for which plaintiff well and truly to be made the United States Fidelity & Guaranty Company binds itself, its successors and assigns firmly by these presents.

Sealed with our seals and dated this 17th day of January, 1957.

The condition of the above obligation is such that whereas the said Bert Ruud and Emma T. Ruud, his wife, are about to take an appeal to the United

States Court of Appeals for the Ninth Circuit, to reverse a judgment rendered and entered on the 15th day of November, 1955, and an order denying a motion for a new trial made and entered on the 26th day of November, 1956, by the United States District Court for the District of Idaho, Eastern Division, in the above-entitled cause.

Now, Therefore, the condition of this obligation is such that if the said Bert Ruud and Emma T. Ruud, his wife, shall prosecute their appeal to effect and answer of costs which may be adjudged against them if they fail to make good their appeal, then this obligation shall be void, otherwise, to remain in full force and effect.

[Seal] UNITED STATES FIDELITY
& GUARANTY COMPANY,

By /s/ AL LARTER,
Attorney-in-Fact.

Countersigned:

By /s/ AL LARTER,
Agent at Idaho Falls, Idaho.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant herewith presents the points upon which they claim the Trial Court erred:

1. The Court erred in refusing to hear arguments and rule on Plaintiff's Motion to Dismiss as to defendants Archie Hill and Zola M. Hill, his wife, prior to the selection of the jury.

2. The Court erred in permitting counsel for defendants Archie Hill and Zola M. Hill to participate in the selection of the jury, prior to dismissing the said Archie Hill and Zola M. Hill as parties defendant, on the grounds they had no compensable interest in the land condemned.

3. The Court erred in refusing to permit Preston Ellsworth, witness for the defendants, to give an opinion as to the highest and best use to which the land involved in this proceeding could be put on the date of condemnation.

4. The Court erred in refusing to permit Preston Ellsworth, a witness for the defendants, to give his opinion as to the fair market value of the farm lands involved in this proceeding.

5. The Court erred in refusing to permit D. Worth Smith, a witness for the defendants, to give an opinion as to the highest and best use to which the tracts of farm land involved in this action could be put at the time of condemnation.

6. The Court erred in refusing to permit D. Worth Smith, a witness for the defendants, to give an opinion as to the fair market value of the farm lands involved in this proceeding.

7. The Court erred in requiring every witness testifying as to highest and best use of property be a real estate appraiser.

8. The Court erred in requiring that every witness testifying as to fair market value be qualified as an expert real estate appraiser.

9. The verdict is inadequate and appears to have been given under the influence of passion and prejudice.

10. The verdict is contrary to evidence.

11. The verdict is contrary to law.

12. The Court erred in refusing to grant defendants a new trial.

HOLDEN & HOLDEN,

By /s/ WILLIAM S. HOLDEN,
A Member of the Firm, Attorneys for Defendants-
Appellants.

Affidavit of Mail attached.

[Endorsed]: Filed January 24, 1957.

In the United States District Court for the
District of Idaho, Eastern Division

No. 1883

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1001.99 ACRES OF LAND, More or Less, in the
County of Bonneville, State of Idaho; BERT
RUUD and EMMA RUUD, Also Known as
EMMA T. RUUD, His Wife,

Defendants.

TRANSCRIPT

This matter was heard before the Honorable
Chase A. Clark, Chief Judge, United States Dis-
trict Court, sitting with a jury, at Pocatello, Idaho,
on November 7, 1955.

Appearances:

SHERMAN F. FUREY, JR., ESQ.,

United States Attorney for Idaho,

Attorney for Plaintiff.

HOLDEN & HOLDEN,

Idaho Falls, Idaho;

WM. S. HOLDEN, ESQ.,

R. VERN KIDWELL, ESQ.,

Of Counsel,

Attorneys for Defendants.

* * *

The Court: Before we start with the evidence in this case, I think I should tell you, Ladies and Gentlemen of the Jury, that when you were examined in your voir dire, there were several other defendants in this case. However, they have been eliminated from this case at this time and you will not be concerned with other parties other than Mr. Ruud and his wife, the case is confined to them now, and to their holdings. All of the other defendants are now out of the case and I make this statement to you so that you will not be concerned or looking for other defendants. They are [9] not here nor are they involved any further.

L. B. ACKERMAN

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Furey:

Q. Would you state your full name, Mr. Ackerman, for the record?

A. Louis Bernard Ackerman.

Q. Where do you reside, Mr. Ackerman?

A. Palisades, Idaho.

Q. And what is your occupation or profession?

A. I am an engineer, a construction engineer.

Q. And by whom are you employed?

A. The U. S. Bureau of Reclamation.

Q. And where?

A. Palisades, Idaho, on the Palisades Dam.

(Testimony of L. B. Ackerman.)

Q. What is your official position at the Palisade Dam?

A. I am construction engineer on the Palisade project.

Q. How long have you been in that position?

A. I came there in the fall, December of 1951.

Q. On what river is that dam located?

A. On the Snake River.

Q. And it is located approximately where from Idaho Falls?

A. It is roughly fifty-five miles east and a little bit south of Idaho Falls. [10]

Q. Showing you Plaintiff's Exhibit Number 1, marked for identification——

Mr. Furey: It is my understanding, Mr. Holden, that this may be admitted for illustrative purposes?

Mr. Holden: That is correct.

The Court: It may be marked and admitted.

Mr. Furey: And Exhibits Numbers 2 and 3, they may also be admitted for illustrative purposes, is that right?

Mr. Holden: Yes, that is right.

The Court: They may be admitted.

Q. Mr. Ackerman, will you step over to these exhibits and describe to the court and jury what these various designations mean, referring to the exhibit by number as you testify, if you will, please? This (indicating) is Exhibit Number 1.

A. This green colored represents the cropland and the red, wasteland, and then there is some yellow here, that is sagebrush land.

(Testimony of L. B. Ackerman.)

Q. Now, Mr. Ackerman, which of the tracts involved in this case does that exhibit represent?

A. That represents the tract next to Alpine, this is known as Tract 77.

Q. And that map was prepared under your supervision? [11]

A. Yes, sir.

Q. Mr. Ackerman, will you point out on the map the river pasture which is down below the bench from Alpine?

A. This is the river down here and this land would be some of the pasture land.

Q. And will you point out there the buildings, the Alpine townsite buildings?

A. The buildings that are on Mr. Ruud's property, the hotel building here and this building is the cafe, represented by this outline here.

Q. I notice that the boundary line north of the hotel, goes into the tract and back out again and there are buildings shown there, are those buildings involved in this case?

A. No, not in this case.

Q. Those buildings are not on the Ruud property?

A. That's right.

Q. Now, will you step over to Exhibit Number 2 here and tell the Court and jury what tract involved in this lawsuit that represents?

A. This is tract number 41, this is the home place, this tract here, this color represents the cropland and the yellow the pasture, and the red the wasteland, the blue here represents the homestead, the houses, barns, and other buildings. [12]

(Testimony of L. B. Ackerman.)

Q. And what does that little red tip up in the left corner there represent?

A. That is hillside grazing land.

Q. Up in here? A. Yes.

Q. And that is where the boundary line runs up on the side of the hill there? A. Yes.

Q. And will you point out on there where tract number 34 is?

A. That is this little two acre tract right in here, this is tract 34 (indicating).

Q. Which way is north on that map, Mr. Ackerman? A. This way is north (indicating).

Q. And the same is true of the other exhibit?

A. Yes.

Q. Now, directing your attention to Plaintiff's Exhibit Number 3, will you state whether or not this map was prepared under your supervision?

A. Yes, sir.

Q. Will you tell the Court and jury briefly what that is, what this exhibit is and what its purpose is?

A. That is a general vicinity map of this area, this is the home place here, this is Alpine, this is the Alpine place and here is Alpine, here is Jackson, Afton is down [13] here and over here is Idaho Falls, and this is Swan Valley (indicating). This is a vicinity map, a general vicinity map of that entire area.

Q. And the purpose of that is to show the general location of this property involved in this case with reference to these other towns?

A. That is right.

(Testimony of L. B. Ackerman.)

Q. Now, you may return to the stand, Mr. Ackerman. Is it true then that all of the property included within the black lines, and including the two acre piece at the top of Exhibit Number 2, is being acquired and is the property involved in this action?

A. That's right.

Q. How many acres are there in tract number 77, which is Plaintiff's Exhibit Number 1?

A. 328-87.

Q. 328.87 acres? A. Yes, sir.

Q. And how many acres are there in tract number 41, represented by Plaintiff's Exhibit Number 2?

A. 671.12 acres.

Q. And then there are the two acres in the tiny piece up here? A. Yes, sir.

Q. And that makes a total of how many [14] acres? A. 1001.99.

Q. Now, is that 1001.99 acres Ruud property?

A. With the exception of the highway that goes through there.

Q. And how many acres are there in this highway right-of-way?

A. That is 16.56, that is in the lower place.

Q. And that highway is represented by the white strip? A. Yes, sir, the white strip.

Q. And that is through Exhibit Number 2?

A. That's right.

Q. So that actually there are how many acres, total acres of property belonging to Mr. and Mrs. Ruud, not considering that highway?

A. 985.43

(Testimony of L. B. Ackerman.)

Q. 985 and a half acres, is that about it?

A. Yes, sir.

Q. Now then, what interest in this property is the United States acquiring?

A. Fee title.

Q. Full fee simple title?

A. Yes.

Q. Now, do you know the altitude or the elevation above sea level of tract 77, also of tract 41?

A. 77 is roughly between 5,600 and 5,620, and then this [15] Alpine section, that is tract 41, which is the home place, it varies between 5,500 and 5,530.

Q. And that would be true of tract 34?

A. Yes, well, 34 is around 5,490 or 5,000.

Q. Now, do you know on what date these tracts were acquired by the United States?

A. Yes, March 4, 1955.

Q. Now, one more question, Mr. Ackerman; what generally is the purpose of the Palisades Dam?

A. Well, it is a fourfold purpose, you might say. One is supplemental water for irrigation, two is flood control, three is power, and four is recreation.

Q. And what is the primary purpose?

A. The primary purpose is supplemental water for irrigation.

Q. The storage of water for irrigation?

A. For irrigation of existing land around Idaho Falls and down to Twin Falls, and through that area. [16]

* * *

November 8, 1955—11:00 A.M.

DAVID W. DICK

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Furey:

Q. Will you state your name for the record?

A. David W. Dick.

Q. Where do you live, Mr. Dick?

A. Idaho Falls.

Q. What is your business or occupation?

A. I am manager of the Idaho Irrigation District, and I also have a real estate broker's license.

Q. Do you have a real estate office in Idaho Falls? A. Yes, sir.

Q. And are you in the real estate business there?

A. Yes.

Q. How long have you been in that business?

A. I was a real estate salesman in 1948 and 1949 and in 1950 I took out a brokerage license. I have had a brokerage license and been in the business since 1950.

Q. How long have you lived in the Idaho Falls area?

A. I moved in there with my father in 1905.

Q. Practically all of your life?

A. Yes. [28]

Q. Now, Mr. Dick, will you go ahead and explain to the Court and jury what experience you have had

(Testimony of David W. Dick.)

up in that Idaho Falls area in appraising real estate?

A. Well, for the past fifteen years occasionally I would be called to appraise an estate and since, well, during the last few years, since 1952, I have been working for the Bureau of Reclamation appraising land that was to be acquired for the Palisade Project at Palisade, Idaho.

Q. How much land in the Palisade Project have you appraised, how many ownerships?

A. Around forty or forty-five tracts, something like that.

Q. What type of property was that?

A. Well, they were some small units and some large units, mostly farming, and some small stock raising units.

Q. Agricultural property mostly was it, farming and ranching?

A. Yes, sir.

Q. I believe that you mentioned that you were manager of the Idaho Irrigation District. How long have you been employed by that District?

A. I started to work as ditch-rider in 1920, and in 1934 I was employed as construction foreman, and in 1937 I was employed as manager and I have been manager of the district since then.

Q. How many acres comprise that Idaho Irrigation District? [29]

A. 36,500 acres.

Q. And where is that located?

A. Well—

Q. —just generally, Mr. Dick, with reference to the Idaho Falls area and the Palisade Project?

(Testimony of David W. Dick.)

A. It takes a strip through Bonneville and Bingham Counties, and ends up six miles southeast of Firth.

Q. It is in the same general area as the Palisade Project?

A. In the same county, with the exception of that portion that is in Bingham County.

Q. Did your duties since 1937, as Manager of the District, give you occasion to become familiar with land values in that District and the surrounding area? A. Yes.

Q. Will you just describe in what way?

A. Well, I have had occasion many times to talk with farmers, to go out on their farms when they were actually farming, when they were tilling the soil, irrigating the soil, and to discuss problems with them. I have had occasion to help acquire right-of-way, new land for right-of-way for the enlargement of our system generally, and I have been in contact with farming and agriculture all of my life. I was raised on a farm. [30]

Q. In connection with your duties, would you have occasion to know when property in that area was sold and the purchase price, what the purchase price was for the property? A. Yes.

Q. And that would continue up to the present time, would it? A. Yes.

Q. In connection with your real estate business and acting as a broker in real estate purchases and sales, have you had occasion to appraise real estate in Bonneville County and in that general area?

(Testimony of David W. Dick.)

A. Yes, very much.

Q. Will you describe how that would come about?

A. On many occasions sellers decide to sell, sometimes circumstances such as a death in the family or sometimes other circumstances will bring about the need of selling, and of course, frequently they have no idea as to what the highest market value of their land would be and they asked for someone with experience in that line to come in and help them arrive at a price. I have had occasion to have that happen to me several times.

Q. You have appraised property under the circumstances [31] that you have mentioned?

A. Yes.

Q. And you have bought and sold property in Bonneville County and in that area?

A. Yes, I have.

Q. And this Palisade Project is located in Bonneville County?

A. Yes, sir.

Q. Have you appraised tracts 41, 77 and 34, referred to in this case, as the Ruud Ranch?

A. Yes, sir.

Q. At whose request?

A. At the request of the Bureau of Reclamation originally, and recently at your request.

Q. In your appraisal of those tracts did you go out and actually visit the land?

A. Oh, yes.

Q. Will you describe to the Court and jury, the times that you went out and how long you were on the property on each occasion?

(Testimony of David W. Dick.)

A. As near as I recall it, the first occasion I had to go on Mr. Ruud's property was on October 16 and 17 and again on the 20th of October, 1952, and then again in July, July 30, 1953, now should I say——

Q. ——just go ahead and tell how long you were on the property? [32]

A. Well, I think that the jury understands that there were five appraisers, but I am speaking of my own.

Q. I was asking with reference to what you did up there, Mr. Dick?

A. I went to the Ruud residence and became acquainted with Mr. Ruud and he and I went over the property. He pointed out all of the details that he could think of. He pointed out the classifications, the fences, he pointed out the ditches and he pointed out the property lines, and he pointed out the pasture land and the springs. I walked along with Mr. Ruud up and down and across over this property.

Q. Did Mr. Ruud go over all three of these tracts with you on that occasion?

A. On tract number 34, the little tract up in the north end—yes, Mr. Ruud was with me then, too.

Q. Now, were you on the property all day on those days, or just a part of the day?

A. All day on the 16th and all day on the 17th and the 20th I went back to do some more checking and then I retired to the office to write my report, but the two days I spent with Mr. Ruud.

Q. Then, as I understand it, you were on that

(Testimony of David W. Dick.)

property again in 1953? A. Yes, sir.

Q. How long on that occasion? [33]

A. I just went out, not quite all day. It was a short day because Mr. Ruud had painted some buildings, he had done some improvement and he changed some of the land, he plowed some new land up and we went over it to note the changes that had been made since the previous appraisal.

Q. When was the next time that you were on the property?

A. The next time I was on the property was September 2, 1955 and September 7th and 9th, 1955.

Q. That was the time that you went on at my request? A. Yes, sir.

Q. Did you examine all of the property again on these occasions?

A. I had a very detailed account of all of the properties prior to going on. Of course, this last time I went around to check to see that everything was the same as it was previously. I had the measurements of all of the buildings and everything like that. I drove over the property, I viewed the lines, the pasture and—yes, I made a general inspection the last time also.

Q. Will you describe to the court and jury briefly, what procedure you used in appraising those tracts?

A. Well, I went over the land and as I walked over the properties I tried to classify the land as to soil types, if it was mellow, nice soil or if it was gravelly, [34] if it were level, if it were rocky. I

(Testimony of David W. Dick.)

took every detail into consideration. I followed the ditches up and down and I could tell quite well the depth of the soil from the ditches. Where the soil was deep there would be no gravel in the bottoms of the ditches. I went over all the pasture land and I viewed the springs that furnished water for this pasture land for winter feeding. I took everything into consideration. I tried to not miss anything because I felt that appraising was a serious job and that I should use my very best judgment and go into every detail, everything that I could think of that I thought had any value in fixing the appraisal. I placed the right appraisal, as I knew, and I gave it a very detailed inspection.

Q. Did you do anything in addition to actually inspecting the property? A. In what way?

Q. Did you check any records of sales in the area? A. Yes, oh yes.

Q. Go ahead and tell us—just tell us, was that a part of your procedure in this case, a part of the procedure that you used?

A. Yes, in order for an appraiser—

Q. —just state what you did, Mr. Dick.

A. We viewed other ranches up and down the valley, spent days [35] viewing other ranches that had been sold in order to get an opinion in our minds about what the average market value was in that area.

Q. Those were sales in the open market that you considered? A. Yes.

Q. Directing your attention to tract number 77,

(Testimony of David W. Dick.)

that is the Alpine Tract, that is laid out on Exhibit Number 1. Do you have an opinion as to the highest and best use that land could have been put to on March the 4th, 1955, or within a reasonable time thereafter? A. Yes.

Q. And what is that?

A. I believe dry farming, barley, grass pasture for feed would be its best use.

Q. And what do you base that opinion on?

A. Well, just the general conditions, the fact that it is dry land in the first place, and in the second place that it is quite high and the seasons are short and it would not be suitable for row crops.

Q. Is it an irrigated patch or is it a dry farm?

A. No, it is a dry land patch.

Q. Do you know how many acres there are in that tract? [36]

A. Yes, there are 328.87 in tract number 77.

Q. Will you tell the court and jury very briefly what you observed as to the physical characteristics, the topography of that ground? A. Yes.

Q. You may step down to the map if you would like in order to explain your testimony.

A. This portion here had a store, and this has the improvements, all kinds of improvements, and extending back through this area is all gravelly type of land, the gravel is close to the surface and very visible. There are quite a lot of large rocks visible and sometimes there are little abrupt ridges extending out of the ground. This portion up here is quite a lot better, the soil is of a more mellow type and

(Testimony of David W. Dick.)

less gravelly, there is much less gravel in the soil. This portion down under the hill is very good land and it would be suitable for grain or hay, but generally speaking, the Alpine tract is quite gravelly.

Q. Do you know what these red markings are in there, what do they mean? A. Yes.

Q. What does that represent if you know?

A. That is a bluff, this land is on a different level [37] than the land above it. There is a steep bluff that goes down from one tract to the other. Down there, that portion is rocks and brush, it is just a bluff.

Q. And what does that red part over near the townsite represent with reference to this bluff?

A. There is a little piece of land there where an old ditch at one time was constructed and it has never been filled in.

Q. Where is that, just point it out on the map?

A. That is this tract right here, this little strip (indicating).

Q. Now, will you describe, that is, for the purpose of illustrating, just what that long red part there is, and what the contour of the land is as you move from the hotel down to the river?

A. This is a steep bluff from the hotel down to the river, this red portion is the steep part of the bluff and this (indicating) is a nice level piece of ground and then there is another place here that goes right on down to the river.

Q. I see, that red portion is the steep part of the bluff? A. Yes, sir.

(Testimony of David W. Dick.)

Q. And what type of growth was on this bluff?

A. Just sagebrush. [38]

Q. Just sagebrush, and do you know what that long red strip in the upper righthand corner is?

A. Yes, it is just a continuation of this old canal that was dug many years ago. It never has been used and it has not been refilled.

Q. And what are those little red markings in other places on the map?

A. Those are just little abrupt outcroppings of rock and brush.

Q. And you went over that property and observed those things, did you? A. Yes.

Q. And what is the yellow portion on the right side of the map?

A. The yellow portion would be the townsite.

Q. And do you know what buildings or improvements, if any, are located on that townsite?

A. Yes, there is a hotel building. I understand that it used to be a store, but it has been changed to a hotel building now. And then there is a cafe building.

Q. Now, step over to this map and describe as you have on tract number 77, what you found as to the physical topography of tract number 41?

A. Well, we have quite a considerably different situation here. We have a good ranch to start with and I will point [39] out as near as I can, my opinion of the different types of soil. Beginning at the north end, this eighty and down to this road, that is a lane that goes back to the neighbor's property,

(Testimony of David W. Dick.)

and this is very good soil, mellow, nice soil. This particular little tract here runs up on the sidehill, it corners up on the mountain and is in the form of a pasture, sidehill pasture. This is just grazing land but this is farm land here (indicating), and the north end is much better down to this roadway. From the roadway down and on the east side of the highway this tract contains more gravel, and it isn't as good land, in my opinion, as this upper land. Then we come on down to this portion on the west of the highway, this portion of land is more or less the same type, it is quite gravelly and then from here down it starts breaking off and becoming better, more mellow soil all of the time, that is, this yellow portion is under the hill, that is pasture under the hill, but I am speaking of the green portion that is above the hill, that is cropland, farming land, and it improves all the way up here (indicating). And this portion here around the house and down north of the house is exceptionally good land and it produces well. That holds true down as far as this big hollow in here, and then there is a little difference in the soil over here on this side, it isn't [40] quite as good as some of these other types of soil. The homestead is very nice, well-fenced and all. This portion (indicating) is a little pasture and it also runs up on the hill, and that I classed as being pasture land. Down under the hill along in this area there are several good springs that rise under the bluff, this is down under the bluff from this land, this land is all higher than this (indicating). The yellow is under the bluff.

(Testimony of David W. Dick.)

There are a lot of good trees and willows and shade for stock, and there are a lot of good springs down under there, I say a lot but there are several good springs. Mr. Ruud has taken these springs and made little lakes out of them to retain that water in a storage capacity and then he has made a ditch down through this ground here, on the high ground, which tends to irrigate it and keep it wet. It is exceptionally good. This portion up here is pasture but not as good as this.

Q. Is that upper portion, the yellow upper portion, is it being cultivated?

A. This is sagebrush pasture, but with quite a bit of grass in it, it is not being cultivated.

Q. What are those red markings in there?

A. They are outcroppings of rock and gravel.

Q. Now, referring to the map again, could you point out about where those twenty metal granaries are located? [41]

A. The twenty metal granaries are located just as you make your approach to the neighbor's driveway up here.

Q. And they are practically in the same position as that strip just east of the highway, is that right?

A. I think the red strip indicates the neighbor's roadway.

Q. Well, I mean the one below that, Mr. Dick?

A. Yes, they are right along here in this tract along here, just to the right of the neighbor's roadway as you make your approach.

Q. Mr. Dick, keeping in mind that the definition

(Testimony of David W. Dick.)

of fair market value is the amount of cash or its equivalent that a person willing to buy but not required to would pay, and a person willing to sell but not required to would accept, and considering the highest and best use to which tract 77, the outlined tract up there, could have been put to on March 4, 1955, or within a reasonable time after that, do you have an opinion as to the reasonable market value of tract number 77?

A. I do, as of March 4th, 1955, I do.

Q. And what is that opinion?

A. \$28,410.50.

Q. Have you figured that out per acre, and if so, what does that amount to per acre?

A. \$86.50 per acre. [42]

Q. Does that include the valuation, if any, that you put on the improvements on that tract?

A. It does.

Q. Now, just with reference to tract number 77 itself, just describe what you took into consideration in arriving at that figure?

A. I took into consideration the improvements, the type of land, the location of the property, the climate, and I tried to include in my opinion everything that would have any bearing on the value of the property, including neighboring sales. I attempted to arrive at a fair market value.

Q. Now, Mr. Dick, directing your attention to tract number 41, the home place, which is represented on Exhibit 2, and keeping in mind the same definition of fair market value which I gave you a

(Testimony of David W. Dick.)

moment ago, I will ask you if you have an opinion as to the fair market value of tract number 41 as of March 4, 1955? A. Yes, I do.

Q. And what is that opinion?

A. Including the granaries, Mr. Furey, my opinion is that tract is worth \$137,109.40.

Q. I believe that you covered tract number 34, which is the little two acre piece. Now, keeping in mind the same definition of fair market value that I just gave you, do you have an opinion as to the fair market value [43] of that little two acre tract as of March 4, 1955?

A. Yes, I placed a value of that at \$250.00, that tract.

Q. And what is your opinion as to the total value of the whole Ruud ranch as of March 4, 1955?

A. I believe the fair market value of the Ruud ranch as of the date you mentioned is \$165,769.90.

Mr. Furey: That is all, you may examine.

Cross-Examination

By Mr. Holden:

Q. Mr. Dick, what was the valuation that you placed on the Ruud Ranch on the occasion of your first visit there in October of 1952, I believe it was. I believe that you stated that following your visit to the ranch on those two days, I believe you said, that you made a report and figured the valuation. What was your valuation then? The home ranch I am speaking of, Mr. Dick.

(Testimony of David W. Dick.)

A. That was before the granaries were put on.

Q. Very well, what was your valuation then?

A. On the home ranch before the granaries were put on, \$124,349.40.

Q. Do you know when the granaries were put on?

A. During the summer of '53.

Q. Then what did you give for the home ranch on your appraisal in September of 1955, with the granaries on, [44] I mean with the granaries off, without the granaries, without taking them into consideration?

A. \$129,109.40.

Q. And what valuation did you allow for the granaries?

A. \$8,000.00.

Q. What valuation did you allow on the Alpine Ranch in October of 1952?

A. Mr. Holden, that was in July.

Q. You testified, I believe, October 16, 17 and 20?

A. That was the home ranch.

Q. When did you appraise the Alpine Ranch in 1952?

A. The Alpine Ranch was appraised in 1953, July 28th and 29th of 1953.

Q. Then you never visited the Alpine Ranch in 1952?

A. Not for the purpose of making an appraisal in 1952, no.

Q. What valuation did you place on the Alpine Ranch on July the 28th and 29th of 1953?

A. \$27,470.00.

Q. And what valuation did you place on the Alpine Ranch in September of 1955?

(Testimony of David W. Dick.)

A. \$28,410.50.

Q. Now, I believe that you testified that in July of 1953, that you again visited the home ranch?

A. July 30th. [45]

Q. And what valuation or appraisal did you make of the fair market value on that date?

A. The way that was done, Mr. Holden, we considered the new ground that had been plowed and we considered the painting of the buildings and the improvements that Mr. Ruud had done.

Q. What valuation did you have on July 30, 1953?

A. There would have been \$800 added to the figure that I just gave you.

Q. And how much is that? A. \$125,149.40.

Q. Now, in appraising these properties, did you take into consideration the highest and best use to which those properties can be put?

A. Yes, sir.

Q. On the occasion of your subsequent appraisals, subsequent to October, 1952, did I understand you to say that you took into consideration on the later appraisal certain lands that had been placed under cultivation that had not previously been under cultivation? A. That was done on July 30th.

Q. July 30th?

A. Yes, and again on the later appraisal there had been 10.50 acres broken up across the highway and converted [46] from sagebrush to farming ground and we gave that a new valuation.

Q. You increased the value on that?

(Testimony of David W. Dick.)

A. Yes, sir.

Q. After it was placed in the farm?

A. Yes.

Q. On the occasion of your first appraisal you didn't actually give it an appraisal on its highest and best use?

A. Yes, sagebrush ground.

Q. On the first occasion, the first appraisal?

A. Yes.

Q. Was it obvious that it could have been farmed?

A. There was quite a lot of rocks in it, but I was under the impression that if it could have been farmed it would have been farmed, it was being used for pasture.

Q. Was it obvious that it could have been farmed?

A. Yes, it was obvious that it could have been, but it wasn't being farmed.

Q. But you didn't place your valuation on the basis of its highest and best use then when you first appraised it?

A. Yes, because it was in sagebrush and I thought at that time that its highest and best use was pasture.

Q. And you were not able to determine that its highest and [47] best use would be for farming purposes?

A. Not when it was in sagebrush.

Q. Then you were appraising the land on the use that Mr. Ruud was making of it, isn't that right?

A. That's right.

(Testimony of David W. Dick.)

Q. And that is what you actually took into consideration? A. That's right.

Q. And your appraisal was governed by the use he was making out of the ranch? A. Yes.

Q. Out of that particular part of the ground that was in sagebrush at that time?

A. That's right.

Q. So far as that part was concerned?

A. Yes.

Q. In your appraisal of the bottom pasture land at the home ranch, which I believe was the land over here in yellow, is that correct? A. Yes.

Q. What appraisal, what figure, did you place on that land per acre? A. Per acre?

Q. Yes? A. \$140.00 per acre.

Q. \$140.00 per acre for the yellow land? [48]

A. Yes.

Q. Is that land suitable for farming?

A. Not without a lot of clearing. It is my opinion that its best use is for stock and pasture.

Q. Is there any of this lower yellow area that would be suitable, in your opinion, for farming?

A. A portion of it, a small portion of it.

Q. How many acres of it would be suitable, would you estimate? A. Possibly thirty-five.

Q. Did you value that for the highest and best use on a farming basis?

A. No, I valued that as pasture land.

Q. You disregarded any value it might have for farming purposes?

A. Yes, I thought it was best for pasture.

(Testimony of David W. Dick.)

Q. I say, you disregarded any value that it might have for farming purposes? A. Yes.

Q. Did you make any inquiry of Mr. Ruud as to whether or not any land in yellow had been cultivated? A. Mr. Ruud was over it with me.

Q. Did you make any inquiry of Mr. Ruud when he was with you as to whether or not he had ever farmed any of the area in yellow? [49]

A. I don't recall asking him that question.

Q. Did you make any investigation to determine the yield in crops per bushel of grain or tons of hay that this ground would produce? A. No.

Q. You made no inquiry? A. No, sir.

Q. That matter wasn't taken into consideration in arriving at your valuation? A. No.

Q. And the same is also true with reference to the Alpine Ranch? A. That is right.

Q. That is correct is it? A. Yes, sir.

Q. Now, Mr. Dick, directing your attention for the moment to the Alpine property you stated, I believe, that there were outcroppings of sagebrush and rock in various areas in this strip of land running west from the townsite area?

A. Small ones.

Q. Those little areas are marked on this map?

A. Yes, sir.

Q. Then they would be these three little areas here (indicating)? [50] A. Yes, sir.

Q. Do you know the acreage of those three areas, the approximate acreage?

A. Mr. Holden, I lumped that in with the bluff.

(Testimony of David W. Dick.)

Q. Do you know approximately, for the benefit of the jury, that acreage?

A. There was 10.20 acres including the bluff, including all we termed as waste.

Q. Well, how many acres of this bluff, is this red area the bluff? A. Yes.

Q. And all of this would be bluff area in red here (indicating)? A. Yes, sir.

Q. Then those little areas would be a small fraction of an acre each? A. Yes.

Q. A small fraction of one acre?

A. Yes, some as low as one-tenth of an acre.

Q. And does that same explanation apply to the red area in this portion on the Alpine Ranch?

A. Yes.

Q. This area through here, Mr. Dick, will you state to the jury what this area is?

A. As I remember it in my walking over it it is an old [51] canal bed that was constructed and made into a canal and the dirt built up into two banks, and then left. It has never been filled in.

Q. Is there any grass or feed in it?

A. Yes.

Q. There is some feed on that area?

A. Yes.

Q. Any feed in this area down here?

A. Very little.

Q. It is a natural type of growth?

A. It is steep, yes, it is a natural type.

Q. But there is feed?

A. A little feed, yes.

(Testimony of David W. Dick.)

Q. Any feed on the hillside area that is steep you say? A. Yes, there is feed on that.

Q. And the steepness wouldn't have anything to do with the amount of feed on it? A. No, sir.

Q. Do you know the average annual precipitation for the area of the home ranch?

A. Yes, I have it if I can find it.

Q. It was a factor that you took into consideration in appraising this property?

A. Yes, sir.

Q. The rainfall and precipitation? [52]

A. Yes, the average rainfall is fourteen inches a year.

Q. You are positive of that, Mr. Dick?

A. I obtained this from the Government report, the Clinton Report of the Palisade Project.

Q. Did you obtain that from Mr. Ackerman's office?

A. No, I have a copy of the Clinton Report.

Q. Did you obtain any other figures in your examination as to the average precipitation based on data accumulated in Mr. Ackerman's office, the headquarters office of the Palisade Project?

A. No, I did not.

Q. You didn't talk to him with reference to this report?

A. Mr. Holden, I didn't get that question quite.

Q. I was wondering if you made any investigation of the Government reports showing the annual precipitation at the Palisade Dam site at the Government office?

(Testimony of David W. Dick.)

A. No, I have no other information than I obtained myself out of the Clinton Report.

Q. Then if the Government report as to the annual precipitation at the Palisade Dam site area shows a substantial increase in average annual precipitation, then you would take that into consideration in fixing the valuation on these properties, would you? A. Well——

Q. ——If the Government reports at the Palisade Dam site area shows a substantial increase in precipitation [53] annually over what you have just given, you would give that consideration in placing your appraisal on these properties would you?

A. I assumed——

Q. ——Not that, Mr. Dick, I am asking if it showed a substantial increase, would you then take that into consideration in arriving at your valuation?

A. Yes, sir, I think I would have to.

Q. And you would revise your appraisal figure accordingly, depending on the amount of increase in the annual precipitation shown by the reports in the Government office at the Alpine office, over these figures that you have given?

A. I don't think there would be enough difference to revise my appraisal figure.

Q. But you would take it into consideration, I believe you said that, in arriving at your report?

Mr. Furey: I think that answers your last question, and I will object to this as repetition because he has said he would take it into consideration.

(Testimony of David W. Dick.)

The Court: He is under cross-examination here, so I will let him go ahead.

Q. That would be an important factor in placing the valuation on the property would it not? [54]

A. Yes.

Q. So far as the Alpine Ranch is concerned?

A. Yes.

Q. And even so far as the home ranch is concerned? A. Yes.

Q. And if it were substantial, if the increase were substantial, you would then consider that and then increase the amount of your appraised valuation?

A. Well, Mr. Holden, I wouldn't do that for the reason that the precipitation record, the record of precipitation in that valley is that the dry months are July, August and April. And if this rain should happen to fall in May or June, or the wet months, it wouldn't make that much difference.

Q. I am not asking that, Mr. Dick, I am asking if the average annual precipitation is substantially greater than the figure you have given, then you would take that into consideration in fixing the value of the properties?

A. If it was substantial enough in my opinion to justify a change.

Q. If that report would show an increase of six or seven inches over and above the figure that you have given on an annual basis, would that be sufficient in your opinion to give an increased or revised appraisal figure? [55]

(Testimony of David W. Dick.)

A. Not unless I knew in what months it fell.

Q. Do you know what the annual precipitation in the Idaho Falls area is, the average annual precipitation?

A. I haven't checked it recently, I don't know for sure. We depend on irrigation there.

Q. Is it substantially less in that area?

A. Yes, it is substantially less.

Q. With reference to the Alpine Ranch, does that ranch, do you know from your investigation, depend on the moisture for crops from natural precipitation?

A. Yes.

Q. Are there any springs located on the Alpine Ranch?

A. I never was able to find any springs on the Alpine Ranch, no, sir.

Q. To your knowledge, there are none?

A. That's right.

Q. What area, or what acreage, is shown in this area marked in yellow, do you know?

A. I think it is the townsite.

Q. The Alpine townsite, do you know the number of acres?

A. 1.50 acres.

Q. And did you take into consideration in arriving at the fair market figure, whether or not there was any—in considering the highest and best use to which this land could be put, did you consider whether there was [56] any need for increased acreage to be set aside for townsite purpose?

A. No, I didn't. I allowed more for the townsite

(Testimony of David W. Dick.)

than the other ground, but I didn't consider the need for more acreage.

Q. Where is that townsite located?

A. It is located at the intersection of highways 189 and 26, near the dividing line or the state line between Wyoming and Idaho. The buildings on the west side are in Idaho and the buildings on the east side of the road are in Wyoming, the line runs between the two sets of buildings.

Q. And so the line, the state line, is located about the center of the highway? A. Yes, sir.

Q. Then the townsite is located on the border or the Idaho-Wyoming line? A. That's right.

Q. At the junction of two important U. S. highways? A. Yes.

Q. Are those highways, as a result of your investigation, are they kept open during the winter months?

A. All I know is that on the occasions I have had to travel them in the wintertime, they have been open when I had to travel them during the last two or three winters. [57]

Q. You didn't make an investigation to find that the highway department kept them open?

A. No.

Q. But you know of common knowledge that people go into Jackson, Wyoming, on that road in the wintertime? A. Yes.

Q. And to Afton, Wyoming, and points south?

A. Yes.

Q. Do you know whether there is bus service

(Testimony of David W. Dick.)

available in that area? A. Yes.

Q. Daily transportation service?

A. Yes, I think that is called the Alpine Bus.

Q. Is it the Star Valley Bus? A. Yes.

Q. I think the Star Valley-Jackson Bus?

A. Yes, I guess that's it.

Q. Is there daily service?

A. I believe that is, yes. [58]

* * *

DAVID W. DICK

recalled and cross-examination continued, having heretofore been duly sworn.

Cross-Examination

By Mr. Holden:

Q. Mr. Dick, you testified that the highest and best use for the Alpine property was the raising of barley and pasture, was that your testimony?

A. Yes.

Q. In arriving at your valuation, that is what you took into consideration, that those were the types of crop that could be raised? A. Yes.

Q. Pasture and raising barley?

A. Yes, sir.

Q. Do you know whether or not wheat is raised in the area?

A. I don't think there is hardly any wheat raised in the area. In the three summers that I have been up there, I have noticed two or three small patches of wheat.

(Testimony of David W. Dick.)

Q. Then they can't raise wheat in the area?

A. I have seen wheat growing there.

Q. Do any of the farmers in that area, the area of the Alpine Ranch, have wheat allotments.

A. Not to my knowledge. [61]

Q. To refresh your recollection, do you know whether or not the Shurtliff property had a wheat allotment?

A. I am not familiar with that.

Q. That joins the Ruud property. You don't recall having considered that matter in connection with the appraisal of that land?

A. I didn't appraise the Shurtliff property.

Q. What type of property do you have in mind on that?

A. I would think early spring pasture, May or June pasture, and then again fall feeding for sheep.

Q. Did you take into consideration whether or not they could raise seed potatoes in that area?

A. No. My best opinion is that they can't on account of the frost, the early frost.

Q. Do you know whether they raise seed potatoes at Ashton, Idaho?

A. Yes, they do.

Q. And that is a similar elevation?

A. Yes, a similar elevation.

Q. Do you know whether they raise seed potatoes in Teton Basin?

A. Yes, they do.

Q. They raise a lot of them there?

A. Yes.

Q. And that is a higher elevation, isn't it? [62]

(Testimony of David W. Dick.)

A. According to Mr. Ackerman's testimony, yes.

Q. And do you know whether or not they raise seed potatoes in the Irwin area?

Mr. Furey: I am going to object to this. I am going to object on the ground that it is incompetent, irrelevant and immaterial, it is immaterial for the reason that the mere fact that the elevations are similar doesn't necessarily mean that they have the same climatic conditions there, there could be other factors such as mountain protection and other things that could determine when they would have a frost in these areas that counsel mentioned. There is no foundation laid for that.

The Court: I will let him go into that, we will see if he can connect it up, he may proceed.

Q. Do you know whether or not they raise seed potatoes in the Irwin area?

A. I have never seen any there.

Q. You never made any investigation to determine what crops they could raise in the Irwin area?

A. I never saw any potatoes so I wouldn't know.

Q. You never checked to see what crops they could raise in the Swan Valley area?

A. Yes, I have checked in the Swan Valley area.

Q. Do you know whether they raise seed potatoes there? [63]

A. I think they do on the lower ground.

Q. And how far is that from Mr. Ruud's Alpine Ranch?

A. I imagine about twenty-five miles.

(Testimony of David W. Dick.)

Q. You didn't take into consideration, did you, in connection with placing a fair market value on the Alpine Ranch, whether they could raise alfalfa seed on the ranch?

A. My best judgment at the time when I was appraising was that they couldn't due to the frost, the early and late frost. I don't believe that they could raise alfalfa seed.

Q. You didn't take that into consideration?

A. No, I assumed that they could not.

Q. I believe that you testified that this Alpine Ranch was dry farm? A. Yes, sir.

Q. Do you know whether or not crops are raised on that each year?

A. My information from people who have lived in that area is that the last few years it has been cropped every year, but that years ago it was in pasture, in hay, and sagebrush, and there was no need for it to be cropped every year. However, I examined the crops in there while growing and at harvest time two or three falls, the barley, and I am convinced that if [64] they continued to raise barley every year——

Q. I just want you to answer my question, Mr. Dick.

Mr. Furey: I think that the witness should be allowed to finish his answer.

The Court: Yes, let the witness explain, Mr. Holden.

Mr. Holden: I certainly want to give him every opportunity to explain.

(Testimony of David W. Dick.)

A. I believe that if they should continue to raise barley every year they would eventually run the land out so that it wouldn't produce a profitable crop. It is the type of land that cannot stand to be cropped every year.

Q. That is true of all land, you couldn't crop it every year with the same crop?

A. It is not good for the land, no.

Q. That isn't good for any land? A. No.

Q. And could you raise a crop on the Alpine Ranch with some diversification of crops, with crop rotation?

A. I would say that you would have to dry farm it and let it lay idle every other year.

Q. And that is the basis for your valuation, that is, leaving it idle every other year?

A. If you continued farming it, yes. [65]

Q. And you took that into consideration?

A. Yes, sir.

Q. And did you know whether there was any fall plowing on the Alpine Ranch in the fall of 1954?

A. As I remember there was some fall plowing in the fall of 1954.

Q. And did you take that into consideration in placing the valuation on that land?

A. No, I assumed that he was doing that as all farmers do, they try to get as much fall plowing done as they can to relieve them of that much work in the spring.

Q. This land was condemned, I believe you know, in March, March 4, 1955?

(Testimony of David W. Dick.)

A. That is my understanding.

Q. And in your valuation you didn't make any allowance for fall plowing? A. No, sir.

Q. Do you have an opinion as to the cost per acre of plowing land?

A. Well, I imagine with modern equipment of today, one could plow it for a dollar and a half an acre.

Q. Do you know what the going price is?

A. I do not know, no, sir.

Q. And what is the home ranch best suited for, Mr. Dick?

A. The home ranch is best suited for the production of [66] hay, pasture, and barley, in my opinion.

Q. You did not, in arriving at the fair market value, take into consideration any crop such as wheat that might be raised on it?

A. Yes, I took that into consideration, Mr. Holden, I did. I thought that the risk of early frost was too great—late frost in the spring and early frost in the fall was too great for them to take the risk on raising wheat.

Q. That was your own opinion?

A. Yes, sir.

Q. You don't know the practice with reference to raising wheat on the ranch?

A. Only as I observed it the last three summers.

Q. And you don't know what the practice is as to raising wheat in the area around the home ranch?

A. Only as I observed it in the last three summers and I saw very, very little wheat.

(Testimony of David W. Dick.)

Q. You have seen wheat in that area?

A. Yes.

Q. And you didn't take in consideration that seed potatoes could be grown on that ranch?

A. Yes, I did take it into consideration if the grower wished to venture the risk of frost that they have in that area. [67]

Q. Did you make an investigation with reference to the frost in the spring, or is it based on your own recollection?

A. No, I have a report on that, from the Clinton Report.

Q. What is that Clinton Report?

A. That is a report which was gotten out for the Palisade Project in order that the dam could be authorized. It has to do with all the facts concerning the area, the reservoir conditions, what the reservoir is to be built and used for, and all of the factors bearing on the Palisade Reservoir.

Q. Do they raise potatoes in the Idaho Falls area?

A. Yes.

Q. Do they have late frosts there in the spring?

A. Some springs, yes, sir.

Q. Well into June?

A. Yes, I have seen June frosts.

Q. Do you know how late in the season they plant potatoes in the Idaho Falls area?

A. June the 1st and 2nd, along in those dates. June 5th would be a late date, it would be the last of the season for planting. May 10th to 20th is potato planting time.

(Testimony of David W. Dick.)

Q. But it is customary to plant them as late as June 5th?

A. I have seen that done, yes, sir. [68]

Q. Did you make an investigation to determine whether seed peas could be raised in the area of the Ruud home ranch and the Alpine Ranch?

A. I believe they could be raised, yes.

Q. But you actually didn't take that into consideration in your valuation?

A. No, sir, I didn't.

Q. Now, I believe that you testified on direct examination that there were springs located on the home ranch?

A. That's right.

Q. Those springs are in the area of the yellow patch, are they?

A. Down under the bluff.

Q. In this area up here?

A. Yes.

Q. Do you know how many springs are in the area of the yellow patch here, here on the map (indicating), this is the home ranch.

A. Well, I don't know exactly how many, I observed about four or five good springs, there may be little tricklings but I observed four or five good springs.

Q. You never actually checked to count each spring?

A. Mr. Ruud walked with me and we went through the willows there and he directed me to the main springs. He indicated four or five good springs and he didn't call [69] my attention to any wet

(Testimony of David W. Dick.)

spots on the bank that could be construed to mean springs. All the springs he showed me were good springs.

Q. Will you tell the jury just what you observed with regard to the water there in those springs, the volume of the water?

A. I observed that Mr. Ruud had created a little reservoir around those springs by means of pushing up the bank to retain the water in a pond. He had evidently done that with a bulldozer and he created a little outlet and put in a headgate to release the water from the springs as he wished to have it, and then he had the main ditch across this pasture land where his pasture was kept wet by this water from the springs.

Q. Did you check to determine whether there was a continuous flow of water from the springs that rise on the yellow area?

A. Yes, there is a continuous flow.

Q. And did you determine how many inches, or have you an estimate as to the number of inches that rise and that flows from those springs?

A. When I was there, and Mr. Ruud was with me, the water was all coming through the ditch at that time. I didn't measure it but I would judge there was 45 or 50 inches from all of the [70] springs.

Q. And when was that?

A. That was October the 16th and the 17th, 1952.

Q. Did you observe the flow of water from those

(Testimony of David W. Dick.)

springs in September of this year when you were on the place?

A. Yes, sir, and I couldn't see any particular difference.

Q. You would estimate the same number of inches? A. Yes, sir.

Q. That is just an estimate by looking at them?

A. Yes.

Q. You don't know whether there is a greater flow during the spring of the year or not?

A. I don't know, but from the source of the springs and the regularity they seem to have, I don't think that there would be any more in the spring because they seem to be good substantial year round capacity springs.

Q. And you don't know whether they vary during the summer months, that is, of your own knowledge? A. No, I don't.

Q. Who was with you when you first went to the ranch for the purpose of making the appraisal?

A. J. R. Sayer, Alvin Robinson and J. C. Bennett and myself.

Q. They were appraisers along with you?

A. Yes.

Q. Appraisers for the Bureau of [71] Reclamation? A. Yes, sir.

Q. And they accompanied you to the Alpine property when you later went up there?

A. Yes, sir.

Q. Mr. Bennett and Mr. Robinson served with

(Testimony of David W. Dick.)

you as appraisers for all of these properties in that area?

A. Yes.

Q. Do you know their business, Mr. Dick?

A. Mr. Bennett——

Mr. Furey: ——I object to that, your Honor, not that I care whether he has this information or not, but I cannot see where it is material to any of the issues here.

The Court: I don't believe it is material to the matters at issue here, but I will let him tell you what their businesses are.

A. Mr. Bennett is a retired rancher and a retired bank director and he makes personal loans on properties.

Q. And Mr. Robinson?

A. That was Mr. Bennett I told you about.

Q. Yes, and now what is Mr. Robinson's business?

A. I understand that he is a machinery dealer at Afton, Wyoming, and also a Studebaker automobile dealer.

Q. Was he a former officer of a bank in that area?

A. I don't know as to that, but I do know that he sold a [72] very good ranch in Star Valley when he moved to Afton and went into the machinery business and the automobile business there.

Q. You don't know that he was a vice-president of the bank in Star Valley?

A. No, I didn't know that.

Q. Now, in making your appraisals, was it cus-

(Testimony of David W. Dick.)

tomary to discuss the various properties that were being appraised, with the other appraisers, I mean just to discuss the valuation?

A. During the appraisal, during the time that I walked over the ground and the other appraisers walked over the ground, we each took our own courses, we took our own notes, we had our own books and we made up our own minds and arrived at the values and our own prices, but in order for us to turn in a comprehensive report to the Government—that doesn't go in in the form of five appraisals. If they are working on the same property they must have a conference and submit an appraisal that they each approve whether it is their own opinion or not.

Q. Then you do discuss values before arriving at your appraisal, or at the valuation?

A. After the appraisal we discuss the values for submittal.

Q. You discuss the values of the property in question do you not? [73]

A. That's right.

Q. So that actually you do discuss the values with the appraisers that are working on the project or the property with you?

A. Of necessity, yes, sir.

Q. Now, you reside in Idaho Falls?

A. Yes, sir.

Q. And you are Manager of the Idaho Irrigation District?

A. Yes, sir.

Q. Is that a full-time position?

A. Yes, sir.

(Testimony of David W. Dick.)

Q. I believe that you stated, Mr. Dick, that you had purchased or supervised or taken part, in acquiring of land for the District from property owners?

A. Yes, we had several occasions to do that.

Q. And has that been at the request of the property owners in some instances?

A. No, at the request of the District.

Q. And would that be for the purpose of straightening out a bend in the canal or some such purpose as that?

A. Or if we had a weak bank and had to reinforce it we would have to buy more right-of-way to reinforce it.

Q. Did that involve small plats or acreages?

A. Except where we made a new canal and then it would involve several acres, we made two extensions, we made [74] what is known as the German extension and the Butte Arm extension.

Q. How many years ago was this?

A. In 1937, '38 and '39.

Q. But you have built no large extensions, and there was no acquisition of property since those dates?

A. Not of a project nature, no, sir.

Q. Now, you also stated that you had experience as appraiser of estates I believe?

A. Yes, sir.

Q. And in making appraisals for estates, you take into consideration, do you not, the tax problems of the estates?

A. Tax problems?

(Testimony of David W. Dick.)

Q. Yes, whatever inheritance tax might be involved.

A. Not in arriving at the price of real estate.

Q. Did you ever consider the tax problem with which the estate or estates are confronted in arriving at the value of what you are appraising?

A. I never had occasion to, in those appraisals; in the appraisals that I made the requests were always made that I appraise the valuation of the property.

Q. And you have made some appraisals in the Idaho Falls area in connection with that?

A. Yes. [75]

Q. Directing your attention to the Alpine property, what factors did you take into consideration in arriving at a fair market value there, insofar as the location of the property is concerned, the services there for the use of the people who reside on the premises, such as highways, schools and so on, just tell the jury what factors you considered?

A. I didn't take any factors into consideration that I wouldn't give to residential property along the same highway.

Q. Now then, what factors did you actually take into consideration?

A. The fact that there was a mail route, a bus route, also the fact that there was a store there, the fact that it was close to the highway, and I just added those factors all in to arrive at my value.

Q. They are important factors in arriving at the valuation of property?

A. Yes.

(Testimony of David W. Dick.)

Q. Do you know what mail service is available to the property?

A. It is a Star Route from Idaho Falls.

Q. Daily mail service is it? A. Yes.

Q. The same to the home ranch?

A. The same route takes mail to the home ranch, yes, that is the same route. [76]

Q. Is there a daily bus service?

A. There was when I was in the country.

Q. Do you know anything with reference to the trucking service by common carriers?

A. There are many people who have semi-trucks in the area for trucking cattle and produce out of that area. I recall seeing the Doug Andrews Company up there and trucking grain and other materials out of the area.

Q. Then you didn't take into consideration any other type of transportation in there?

A. No, only that it was available.

Q. Do you know whether the television reception is good on the Ruud home ranch?

A. I don't know about that. This man Alvin Robinson said it was good at Afton, Wyoming. I don't know how it is at the Ruud home ranch.

Q. You didn't take that into consideration?

A. No.

Q. Did you take into consideration the availability of schools? A. Yes.

Q. Do you know anything about the school bus service to the home ranch, and the Alpine Ranch?

A. There is daily school bus service.

(Testimony of David W. Dick.)

Q. And good schools in the area? [77]

A. Yes, sir.

Q. And you say daily school bus service?

A. Yes, sir.

Q. Now, in arriving at the valuation, what factors did you take into consideration on the Alpine Ranch with respect to the improvements that you saw there?

A. The improvements consist of a cafe building, a store building that has been converted into a hotel. Mr. Ruud dug a nice well there, there is a well on the premises, the lights are there from the Salt River R.E.A. electrical service.

Q. Did you place a separate valuation on the well? A. Yes, sir.

Q. What valuation did you place on the well?

A. I included the pipe and the well and everything connected with the well, and appraised it at \$1,500.00.

Q. What price or valuation did you place on the hotel?

A. On the hotel I placed a price of \$5,076.00.

Q. How large is that hotel?

A. The hotel is 47 by 27.

Q. How many rooms, do you know?

A. Seven rooms and a bath.

Q. Do you know how many baths?

A. I saw one and I think there was a little wash-room, I don't recall for sure. [78]

Q. You don't recall two baths?

A. I am sure there was one.

(Testimony of David W. Dick.)

Q. You are not sure whether there was a second?

A. No.

Q. If there was a second, would it have any bearing on the valuation you placed on it?

A. I don't think so.

Q. You wouldn't give it any additional or increased value by reason of two toilets and baths?

A. No, I don't think so.

Q. Do you know what kind of heat there is in that hotel?

A. They have butane wall heaters.

Q. And are they installed in each room?

A. Yes, sir, installed in each room.

Q. Did you place any separate value on the land where the hotel is located? A. Yes, I did.

Q. What valuation did you place on that?

A. \$260 an acre.

Q. I believe you testified that you had checked into some sales in the area, did you check into sales in the area of this little block down here (indicating)?

Mr. Furey: Just a moment, I will object to that; there is no foundation to show that the circumstances of the sale were such that it [79] was a free and open sale on the free and open market.

Mr. Holden: I haven't asked what the price was yet.

The Court: He may answer this question.

A. I wonder if I may have that question again?

Q. Did you check into any sale of these premises next to the hotel on this that is blocked out here?

(Testimony of David W. Dick.)

A. No.

Q. You didn't check into that? A. No.

Q. Do you know the size of that area?

A. 1.5 acres.

Q. The part that is blocked out there that is excluded from the Ruud property?

A. I don't happen to know that, I didn't appraise it.

Q. Now, with reference to the store building, what valuation did you place on it?

A. I have it as a cafe building.

Q. Well, let me ask this, what buildings are there?

A. Well, this is a cafe building on the south end, I valued that at \$2,340.

Q. Do you know or did you observe the type of foundation that building is built on?

A. Yes, it is a cement foundation. [80]

Q. Is there water in the building? A. Yes.

Q. Do you know the number of rooms?

A. Well, there is a large front store room, and then a big room in the back that they have used as living quarters.

Q. What valuation did you place on the land where the store building is located?

A. I placed a valuation of \$250.

Q. Is the valuation on the land just on the land occupied by the store building?

A. No, it is not, there is 1.50 acres around the two buildings.

(Testimony of David W. Dick.)

Q. You placed a valuation on the 1.50 acres, of how much money? A. \$250 an acre.

Q. At the rate of \$250 an acre? A. Yes.

Q. And that was an acre and a half of land?

A. 1.50, yes.

Q. Now, were there any other buildings or improvements in the area that you observed that are on the Ruud property?

A. There is a sewer with forty feet of pipe.

Q. Did you appraise that separately?

A. Yes—well, no, it is connected with the well and what [81] goes with the well, so it is included in the \$1,500.

Q. On the Ruud Alpine Ranch are there any other improvements?

A. There is a cafe, a hotel, and a log granary.

Q. The log granary, what valuation did you place on that? A. \$60.00.

Q. Do you know the size of it?

A. Yes, it is 32 by 16, an old building with no foundation.

Q. Is it made into a granary, does it have bins, or do you know?

A. It has been used for a granary at one time and there are bins.

Q. Did you take into consideration the storage capacity of that building?

A. I took into consideration the shape the building was in, the approximate age and that was all.

Q. Are there any other improvements on the Ruud Alpine Ranch that you considered?

(Testimony of David W. Dick.)

A. There was 410 feet of galvanized pipe that would be—I included that, however.

Q. I see, that was included? A. Yes.

Q. Now, was there any fencing?

A. 85 rods of fence.

Q. What type of fence? [82]

A. Two-barbed wire fence.

Q. Did you give any valuation to the fence separately? A. A dollar a rod.

Q. Do you know the type of posts?

A. Old cedar posts.

Q. Native cedar?

A. No, they are the boughten type of posts, old cedar, split cedar type of posts.

Q. With reference to the land in the Alpine Ranch itself, did you place any separate valuation on the land indicated in the map in green?

A. Yes, I placed about two or three different valuations on that, Mr. Holden.

Q. Will you just state what valuations you placed on it?

A. That area down there under the hill——

Q. ——Would it help any if you approached the map to designate the area?

A. I believe I can do it from here, Mr. Holden, I have so many papers.

Q. Now, is this the area you mean right here (indicating)? A. Yes.

Q. This is the rim (indicating)?

A. There is 12.20 acres of land under the hill that is good farming land.

(Testimony of David W. Dick.)

Q. This green area (indicating)? [83]

A. Yes, that is \$100 an acre.

Q. Very well, sir, just proceed.

A. Now then, up in the top area there, down just quite aways further than that, Mr. Holden, about right in there. I have given that 80 acres there a value of \$75 an acre.

Q. That is this 40 here (indicating) and this 40 here?

A. Yes.

Q. That is the entire area across here?

A. Yes.

Q. And all of that area where the pointer is, on down toward, well, clear on back to the buildings?

A. Yes, clear back there.

Q. This area (indicating)?

A. Yes, clear back to the buildings, that constitutes 215.77 acres and I gave that \$50 an acre.

Q. Did you base that valuation—

A. —There are two or three other little tracks up there.

Q. Pardon me, just go ahead.

A. There are 5.20 acres above the red mark up in the corner.

Q. Up here (indicating)?

A. Yes, 5.20 acres, I gave that \$60, the 10.20 acres that is classified as bluff and pasture.

Q. Is that this area that I am indicating here?

A. Yes, the red, that I gave \$10 an acre. [84]

Q. Now, with respect to the home ranch, did you take into consideration the fences?

A. Yes, I did.

(Testimony of David W. Dick.)

Q. Will you state to the jury what valuation you gave to the fences, and indicate the number of rods, do you have that?

A. Yes, I have that. There are, on the home ranch, 300 rods of 30-inch netting at \$2.50 a rod. There are 275 rods of four-barbed wire fence at \$2.00 a rod. There are 560 rods of 26-inch netting and two-barbed wires and that is at \$2.50 a rod.

Q. And that is the valuation you placed per rod?

A. Yes, per rod. There are 620 rods of two-barbed wire at \$1.00. There are 720 rods of three-barbed wire, at \$1.50. There are 360 rods of 36-inch pasture netting at \$3.00.

Q. What do you mean by pasture netting?

A. It is 42-inch netting.

Q. Will you tell the jury what type of fenceposts there are on those fences?

A. Well, most of Mr. Ruud's fenceposts—well, I will say that he has a variety of posts, he has quite a few native cedar posts scattered around in the fences and he has a lot of split cedar posts, some of them are in excellent shape and others are beginning to rot away, but we [85] appraised the fence according to the wire, the netting and the barbed wire on them rather than put too much on the posts.

Q. Did you take into consideration any water pipe or water lines for domestic water purposes?

A. Yes, I did.

Q. And what did you consider as to the number of feet of pipe, or however you determined that?

(Testimony of David W. Dick.)

A. I got this footage from Mr. Ruud and he has 100 feet of one-inch pipe at twenty cents. He has 3,240 feet of two-inch pipe at forty cents. You understand I put the price on it, but he told me the rodage, or the footage, as I say there were 3,240 feet of two-inch and there were 700 feet of one-inch, 300 feet of $\frac{3}{4}$ inch pipe, the $\frac{3}{4}$ inch pipe is at twenty cents and the one-inch at twenty-five cents.

Q. Did you determine the location of these water lines as to what areas on the farm this water was piped to?

A. Yes, the 3,240 feet of two-inch pipe is the main line that comes from his neighbor, Mr. D. Worth Smith, there is a long main line from a spring up in that area, and it comes down to Mr. Ruud's house, then it is piped in different areas to his buildings.

Q. To all of the buildings?

A. To all of the buildings on the bench, yes. [86]

Q. Do you know whether there is any piping down to the bottom pasture land, this area in yellow?

A. I didn't see any, and I wouldn't think that there would need to be any and I wouldn't think there would be any because the water stays open all winter from the spring.

Q. You didn't see any?

A. No, I didn't see any down there.

Q. And is the domestic water supply by gravity flow?

A. Yes, that's right.

Q. Did you place a separate valuation on the spring and on the water pipes?

A. The spring heads up in Mr. D. Worth Smith's

(Testimony of David W. Dick.)

place, and as I recall, Mr. Smith was paid for the spring. Mr. Ruud has the water by right of use, but I don't think that he had the ownership of the spring.

Q. Mr. Smith was paid for the spring by whom?

A. By the Bureau of Reclamation.

Mr. Furey: May I ask a question in aid of an objection, your Honor?

The Court: Yes, you may.

Q. (By Mr. Furey): You say that this spring is located on property other than property involved in this case? A. Yes.

Mr. Furey: Now, we object to [87] anything concerning the spring, there is nothing to show that Mr. Ruud—in fact, the indications are quite strong that Mr. Ruud does not own this spring.

The Court: Mr. Holden, you know whether he does or not, and if he doesn't own the spring then the objection is well taken.

Mr. Holden: Mr. Ruud has used that spring for forty years and I am asking now to see what this witness took into consideration.

Mr. Furey: I think, your Honor, it is improper to suggest to the jury that he should have taken this into consideration. It is my opinion that he definitely should not.

Mr. Holden: Your Honor, it is a well known rule of law in Idaho that most water rights don't originate on the property where they are used. It is a question of use and we will show the use and we think it is a factor in determination of the value of this property.

(Testimony of David W. Dick.)

Mr. Furey: I will concede that Mr. Holden is much better educated on the water rights and water law than I am, but the same law as to irrigation water certainly does not apply to springs.

The Court: I think I know where the line is drawn. You cannot show the value of the spring [88] if the spring is still in the ownership of the person who owns the land where the spring is located, and that is not this party in this action. I will allow you to show what values he used.

Q. Do you know the source of water supply, for domestic use, to the Ruud home ranch?

A. Mr. Rund told us. He instructed us that the source of the domestic water supply was through a long pipeline from a spring that originated on the D. W. Smith property.

Q. Did you inspect the spring to see the source of the water supply for his domestic use?

A. No, I did not.

Q. You didn't go up to the spring? A. No.

Q. You saw the water at the house?

A. Yes.

Q. And you took for granted what he told you as to the source of its supply?

A. I saw the spring when I was on Mr. Worth Smith's place.

Q. You didn't know then that that was the source of Mr. Ruud's supply?

A. No, because I was appraising Mr. Smith's place first.

Q. So far as you know yourself, you don't know

(Testimony of David W. Dick.)

but what Mr. Ruud's source of water supply is from a well, from your own knowledge? [89]

A. I never saw the spot where it entered the pipeline, but I was told by the neighbors and by Mr. Ruud.

Q. But you don't know the source of the supply of the domestic water for the Ruud home ranch?

A. No.

Q. Then you didn't place any value in arriving at your total valuation, on the supply of the domestic water?

A. Not specifically, but he couldn't live down there without domestic water.

Q. But you didn't take that into consideration?

A. I didn't pay him for the water that he uses but I paid for the pipe that leads to the water.

Q. You didn't take the water into consideration in arriving at your valuation?

A. No, I didn't.

Q. What valuation did you place on the pipe?

A. \$1,296.

Q. Is that for all of the pipe?

A. No, that is for the pipe that furnishes his water supply. For all of the pipe it is \$1,551.

Q. What other pipe is there other than the pipe that furnishes the water supply for his domestic use?

A. The pipes that go through the corrals, the yards and the buildings.

Q. Now, did you take into consideration the

(Testimony of David W. Dick.)

buildings and [90] other improvements on the Ruud home ranch? A. Yes, sir.

Q. What improvements did you take into consideration by way of buildings?

A. All of the buildings that were there, the farmhouse, the garage and the barn——

Q. ——Did you place separate valuations on the various improvements? A. Yes.

Q. Now, will you kindly state the value that you gave to each of the buildings and improvements?

A. For the farmhouse 40 by 36 by 8, \$12,960.00.

Q. How many rooms are there in that house?

A. There are five large rooms downstairs with a full basement and a large room, a large attic room upstairs.

Q. Did you take into consideration whether or not it was a modern house?

A. Yes, it is a modern house.

Q. Do you know what type foundation is under that house?

A. Yes, a cement foundation, and it is a good log house covered with shakes.

Q. Is there a fireplace in the house?

A. Yes, there's a fireplace in the house and also a furnace.

Q. Very well, now go ahead with the other improvements.

A. A garage 18 by 20, \$900.00. A barn 12 by 14 by 16, \$336.00. [91]

Q. What barn is that, do you know?

(Testimony of David W. Dick.)

A. It is just a little barn out to the side, just a small building.

Q. A horse barn?

A. I imagine it was used for a stallion at one time.

Q. Do you know what type of foundation that building is on?

A. It is on a cement foundation.

Q. Do you know whether there is a double story to that barn?

A. It is a 16-foot high building.

Q. And is it a double story building?

A. Yes, there is some loft room for hay.

Q. What type of construction is that horse barn?

A. It is a frame construction with metal roof, in fair condition.

Q. Do you know if that is lined with plank?

A. It has a plank floor.

Q. Is there any planks on the walls as you inspected it, on the side?

A. I didn't make a note of any plank. I doubt that there is any on there.

Q. You don't recall that?

A. I don't recall.

Q. Now, go ahead.

A. There is a hog house 24 by 12, \$100.00, the hog house has a lean-to, just a little lean-to there for little pigs, [92] and that was \$10.00. One large granary 18 by 31 by 11, \$1,953.00.

Q. What type of construction is that?

(Testimony of David W. Dick.)

A. Two by four construction, one on top of the other.

Q. That is a good solid type granary?

A. Yes.

Q. And in good condition of repair?

A. Yes.

Q. On a cement foundation? A. Yes.

Q. Now then, with reference to any machine sheds that might have been attached to it?

A. Yes, there are two lean-to machine sheds, 17 by 31 by 11, I gave \$500 for them.

Q. And they are in good condition of repair?

A. Yes.

Q. Do you know the capacity in bushels of the granary?

A. Not for sure, I think it would hold 2,500 to 3,000 bushels of grain.

Q. All right, now go ahead.

A. A cow barn, 49 by 29 by 12 feet high. It is an old building, on a cement foundation. I gave \$1,421.00.

Q. Did you observe whether or not there are two entrances to that from the ground floor level?

A. Yes, there is, there is one on each end, the north and the south. [93]

Q. Is that a two story structure?

A. Yes, there is some storage room.

Q. Storage room above? A. Yes.

Q. Can you enter the second story from the ground floor level? A. Yes.

(Testimony of David W. Dick.)

Q. And what is the size of the upper story that has the ground floor level?

A. It is 49 by 29 by 12, 12 feet high.

Q. Now then, the bottom story?

A. It is about 10 feet high. It is the same dimensions, but about 10 feet high.

Q. And you say there is a ground floor entrance to the second story? A. Yes.

Q. It is built on a hill sort of? A. Yes.

Q. And on a concrete foundation? A. Yes.

Q. What type of roof does it have?

A. It has a shingle roof.

Q. You say it has what kind of a roof?

A. It had an old shingle roof and Mr. Ruud put a metal roof over the shingles and painted it. [94]

Q. Then it has a metal roof? A. Yes.

Q. And what type of metal roof?

A. Just this regular—it is very thin metal, regular metal roofing, sort of a tin——

Q. ——Is it an aluminum type?

A. Yes, an aluminum type roof.

Q. It is an aluminum type roof that you use for that purpose? A. That's right.

Q. And is it in good condition of repair?

A. Yes.

Q. Now, go ahead again.

A. There is a blacksmith shop 25 by 12 by 10, \$100.00. There is a log chicken house 24 by 36, \$125.00.

Q. Did it appear to be formerly built for a house, a home?

(Testimony of David W. Dick.)

A. No, it was built of small logs, especially for a chicken house.

Q. That is your recollection?

A. Yes, that is my recollection. There is a brooder house 12 by 5 by 5, \$75.00. There is a tenant house 23 by 14, and 12 by 20, at \$1,686 and \$720.00.

Q. How many rooms in that house?

A. Four rooms.

Q. Is there running water in the house? [95]

A. Yes.

Q. Is there a basement to the house?

A. Just a little basement with a cement top over it.

Q. Is it in the house or under the house?

A. It is just off kind of to the side, under one end.

Q. Do you enter it from the house, or do you know? A. That is my recollection.

Q. That is a concrete type basement?

A. Yes.

Q. And what valuation did you put on the tenant house?

A. \$1,686, plus \$720. There is a hospital barn down under the hill. It is built of logs and it has a little loft for storing hay. That is valued at \$1,120.00.

Q. Is that on a concrete foundation?

A. On a cement foundation.

Q. And what type of roof, if you know?

A. The roof is metal.

Q. Did you observe the type of construction of the floors? A. Yes, a plank floor.

(Testimony of David W. Dick.)

Q. What type of plank flooring?

A. Three by twelve plank.

Q. Three-inch plank? A. Yes.

Q. Did you observe whether or not it was inner-lined with plank on the inside? [96]

A. Yes, it is a well constructed building.

Q. And the second story of this hospital barn, is it as large an area as the ground floor?

A. Yes, but it is a low roof, it has not too much space, about five or six feet for hay storage space.

Q. Do you know whether it was partitioned, the ground floor area, for box stalls?

A. Yes. Then there is a concrete milkhouse, 10 by 12 by 6, that was valued at \$240.00. There is a woodshed 12 by 14 by 7, \$50.00. That is all the improvements that I could find, including the fences, on the Ruud property, the home ranch.

Q. Were there any corrals on that ranch?

A. Yes, I included the corrals in with the other fences.

Q. Will you tell us what consideration you gave them?

A. I allowed \$500 for the corral, the cutting corral.

Q. And what type of corral did you find that to be?

A. It is built of heavy timber, heavy cedar posts and big gates and things like that.

Q. It is hog tight and sheep tight, is it?

A. Yes, sheep and hog tight.

Q. Now, with reference to the home ranch again,

(Testimony of David W. Dick.)

Mr. Dick, did you break down the land in various classifications in arriving at your appraisalment?

A. Yes, I did.

Q. Just tell the jury what valuation you placed on the farm [97] land? On the home ranch?

A. I tried to segregate them to the best of my ability and the best of my belief, in their different classifications and class them accordingly.

Q. Can you indicate on the map, and then tell the jury, just what valuation you gave to the area?

A. Yes.

Mr. Holden: Your Honor, may he approach the map?

The Court: Yes, he may.

A. Up in this area I took 114.90 acres, up in this area (indicating).

Q. What valuation did you give to that?

A. Could I tell all I have at the same valuation, and then all I have at another valuation?

Q. Yes, go ahead in any way you wish.

A. 114.90 acres up here (indicating) and 10.20 acres right there, and .39 acres right there (indicating), 39.50 right here, at \$125.00 an acre, there was 68.40 acres——

Q. ——How many acres total in that last classification? A. How many acres?

Q. Yes.

A. 213.60. Now, this little hill over here, hillside pasture, I allowed \$25.00 an acre for that; and this little pasture right here, that's 1.4 acres and 2.5 acres. [98] All of the lower ground, as I previously

(Testimony of David W. Dick.)

stated, and anything in this area, that would be termed pasture, such as this low spot, I gave a value of \$140.00 an acre.

Q. That included the area marked in yellow? Did I understand that?

A. It is marked in yellow on this map, yes.

Q. And what other area?

A. This little area here.

Q. And how many acres?

A. The total is 106.86.

Mr. Furey: You mean 106.86 acres, or about 106 and three-quarters acres?

A. 106.86 acres.

Q. (By Mr. Holden): That would be 106.86 acres? A. Yes.

Q. What valuation did you place on that?

A. \$125.00 an acre—wait a minute, that is below the yellow, that's the yellow, I placed a value of \$140.00 on that. Now, this area over here back up toward the house. Back up to the rear of the house, there is 107.40 acres and I gave \$150.00 an acre for that. Then there is this area here on up through past the house clear on up to this swale here that is the choice land of the ranch that is [99] very good land, exceptionally good land, and I gave for 128.60 acres. I gave \$225.00 an acre. Now, there is an area right in here that was the same price acreage.

Q. What area is that?

A. I included this at \$125.00.

Q. How many acres was in that area?

A. There was 68.40 acres, but it is included in

(Testimony of David W. Dick.)

that other acreage, it is included in the \$125.00 price class. There is also another tract down here at \$150.00—it's included in this 107 acres, I have testified to that. Now, there is an area here across the highway that was in sagebrush that has been recently broken up and I reclassified that to \$125.00 an acre and that is included in that, too.

Q. That is included—this area east of the road is in the same classification as this up here in the northern part on the map, the way you gave it?

A. That's right.

Q. Go ahead.

A. So it adds up that I allowed \$225.00 for 128.60 acres. I allowed \$140.00 for 106.86 acres. I allowed \$25.00 an acre for 3.90 acres of pasture land. I allowed \$10.00 an acre for three acres of wasteland, right here—rocks. This was originally classified 9.60 acres; later that was plowed up by Mr. Ruud and he left that part that he couldn't plow; I assume that he couldn't plow it, it is quite [100] rocky.

Q. Are the granaries located on that portion?

A. No, they are right here. I reduced this from 9.50, I mean 9.30, to 3.30 acres, and that was at \$10.00, and then the 16 acres of right-of-way and 213 at \$60.00—excuse me, 213 at \$125.00, not at \$60.00.

Q. Now, you may return to the stand if you wish. Were there any other improvements on the Ruud home ranch, such as metal granaries?

A. Yes.

(Testimony of David W. Dick.)

Q. How many in number? A. Twenty.

Q. Where are they located?

A. They are located just at the end of the white strip, the intersection of the white strip and the red strip right on that point there, just as you make your entrance to the McKay property.

Q. What valuation did you place on the twenty granaries? A. \$8,000.00.

Q. Do you know the capacity of those granaries?

A. They are 1,000-bushel granaries.

Q. Have you checked with reference to the capacity? A. I checked——

Q. You say you did check?

A. Yes, and I was told, the seller of these granaries told me that they were 1,000 bushel [101] capacity.

Q. Those valuations that you placed on them are installed on the ranch? A. Yes.

Q. You are positive that they are over in this area, not in this one (indicating), but are over on this green area?

A. They are on the green area.

Q. Do I understand you correctly, Mr. Dick, when you testify that the various valuations that you have placed on this land, to which you have testified, is based upon soil classifications, is that the way you arrived at the valuation?

A. That is one of the factors, only one of the factors; the north end of the place I call dry farm. I observed no ditches and no source of water, and I

(Testimony of David W. Dick.)

was obliged to call that dry farm, nor did I observe any ditches there.

Q. And you don't know whether there is any water to this land, you are referring to this land up here (indicating)? A. Yes, sir.

Q. And you don't know whether there is any water for that land?

A. According to the decree out of Indian Creek Mr. Ruud has 720 inches decreed.

Q. Do you know whether it is decreed to that land?

A. I don't know whether it is decreed to that land or not, [102] but it is not being used on that land.

Q. If it does have decreed water then, in your opinion, it would not be dry farm land?

A. It would be unless they were using the water upon it.

Q. Do you know whether this land up here on which you placed \$125.00 an acre valuation, in this area, do you know whether there is crops every year on this land?

A. They have the last three years under the same circumstances that existed on the other ranch, but if they continue to raise grain it would have to be laid off and summer fallowed, laid idle for one year and then cropped the next.

Q. Do you know, or did you check, or do you have an opinion, as to whether or not, so far as this land is concerned, whether you could crop it every

(Testimony of David W. Dick.)

year if you used crop rotation on it, where you raised hay and then grain and then back to hay?

A. I doubt very much that it would be a dependable procedure for the reason that there would be some reason that you couldn't get a seeding of hay. You would lose your hay crop, it would be too risky to plant hay without water during the summer, it would kill it out.

Q. You are basing that on your own opinion?

A. That is my own opinion.

Q. You didn't make inquiry to determine what the practice was in the area and you are relying on your own opinion? [103]

A. That is right.

Mr. Holden: I think that's all.

The Court: We will take a fifteen minute recess at this time.

November 8, 1955—3:10 P.M.

Redirect Examination

By Mr. Furey:

Q. Mr. Dick, you were asked whether you inquired of Mr. Ruud as to whether this pasture land down against the river on the home place could be farmed or was going to be farmed, do you recall that question being asked you? A. Yes.

Q. And as I recall, you said that you didn't inquire of Mr. Ruud? A. That's right.

Q. Did Mr. Ruud indicate to you that he ever

(Testimony of David W. Dick.)

intended to use that ground for anything other than pasture as it was being used at that time?

A. No, he didn't.

Q. Just what did he say to you in telling you that?

A. Well, he said that it was wonderful feeding ground for stock, with open water for feed and that there was sufficient water to keep the pasture wet all of the time, and [104] that it was a beautiful place to run stock. I got the idea from Mr. Ruud that he wouldn't do anything but use that for pasture. I certainly got that opinion from him.

Q. Did he ever suggest to you that he ever intended to plow it up and farm it?

A. Not to my recollection.

Q. You were asked as to whether or not the townsite, the Alpine townsite, could be bigger, or should be bigger, whether or not you should have considered a larger area as townsite property. Now, Mr. Dick, do you know how long that highway junction has been up there as a junction?

A. Well, I think I would be safe in saying ten years. I think it would exceed that but I think I am sure in saying about ten years.

Q. Then this junction that I have been asking about has been there for ten years?

A. For ten years at least.

Q. And the Idaho-Wyoming line has been there a good deal longer than that, hasn't it?

A. Yes.

(Testimony of David W. Dick.)

Q. Now, are you familiar with the growth of that townsite up there, if any, in the past ten years?

A. I have had occasion to go up there hunting and fishing a good many times in the past ten years, and I haven't observed any growth in that townsite during that period, no. [105]

Q. There has been no growth in the townsite during that period of time? A. No, sir.

Q. And did you take all of that into consideration in placing your valuation? A. Yes.

Q. In your discussions or conversations with Mr. Ruud, as to the Alpine place, did he ever suggest to you any intention or desire on his part to use that property to raise seed potatoes? A. No.

Q. Did he discuss the possibilities of that ground for the raising of seed potatoes, with you?

A. No.

Q. Did he ever suggest or discuss with you that he thought that that ground could be used to raise alfalfa seed?

A. He told me that it raised beautiful hay, but I don't recall that he said anything about alfalfa seed. I do recall that he said that he cut hay on that ground.

Q. Did he ever say that he had any intention, or that he thought that ground could be used to raise seed? A. Not to my recollection, no.

Q. What kind of a crop was it that he had out there last summer, do you know?

A. Barley. [106]

Q. I believe you said that there was some dis-

(Testimony of David W. Dick.)

cussion or conversation about frosts up there, do you have the record, the weather station records, for the past number of years as to when the frost, the latest in the spring and the earliest in the fall, do you have a record of when those frosts have occurred? A. Yes.

Q. Will you go ahead and tell the Court and Jury what you know about the frost situation up in that area from the records that you have examined, and tell where they came from, I mean where the records came from?

A. These are records from the weather station at Irwin and they were collected——

Q. ——Where is Irwin from the Alpine property?

A. Irwin is downstream, down below the Palisade Dam, below the townsite—I mean below the damsite, this is quoting again from the report from which I gave the rainfall this morning, “the nearest weather station to the area is Irwin, seven miles downstream from the Palisade Dam. Records have been kept at this station since 1894. December, January and February are the coldest months with the average minimum temperature ranging from thirty to thirty-four degrees and the average maximum temperature ranging from seven to nine degrees above zero. The wind blows briskly from the southwest down the valley in the summer. July is the warmest [107] month with an average maximum of 83.5, and an average minimum of 51.6 degrees. The highest recorded temperature for July is 102 de-

(Testimony of David W. Dick.)

grees. The average date of the last killing frost is June 21st and the first killing frost is September 1st."

Q. Now, those are the averages over what period of years? A. Since 1894.

Q. And that would be over about the last sixty years? A. Yes.

Q. The average date of the last killing frost in the spring is what?

A. The average date of the last killing frost is June 21st.

Q. And the earliest one in the fall?

A. The first killing frost is September 1st. However, frosts have been recorded in July for the past several years. The average length of the growing season is 72 days. Summer precipitation is the greatest in May and June. The driest months are April, July and August. The annual precipitation ranges from nine to twenty-one inches with a mean of fourteen inches as an average. Snow may fall every month except during the months of July and August.

Q. Now, in connection with that precipitation, you were asked whether or not it would change your opinion if you found out that there was an increase in average [108] precipitation of six inches. Would you like to explain that answer a little further?

A. Well, crops in this area experience their warmest and driest growth period and they make their greatest growth during July and August, and being without water during those months is almost

(Testimony of David W. Dick.)

—well, I will say it is a great handicap, in fact, you can raise a very few crops that will suffer through July and August, and my answer to Mr. Holden this morning was that unless I knew what months the rainfall came in, if they should fall in the dry months—but, according to the records, they do not fall in the dry months, and so it would not.

Q. What do the records show, on an average, as to what months it is during which no rain has fallen, or very little rain has fallen over the period of say the last sixty years?

A. This report says that April, July and August are the dry months.

Q. Then, unless any increase in precipitation should suddenly switch over and start happening during the months which have been dry months for the last sixty years, what would your opinion be as to what effect it would have on the growing of crops up there?

A. I don't think it would have any effect, because a little more rain in a wet season wouldn't help any. It would [109] have to come in the dry season to do any good.

Q. Mr. Holden asked you one or two questions in regard to what you observed as to the springs on that river bottom pasture ground on the home place, and as I recall it, you said that you saw four or five springs there and he asked you whether or not you had seen some other ones?

A. That's right.

Q. Well, now, in reaching your conclusion as to

(Testimony of David W. Dick.)

the value of that property, how did you consider the water situation?

A. There are plenty of springs. The present source of water and the present supply of water is sufficient to water that area in there without any more. There isn't any need for additional water for that small area.

Q. Just state then what the fact is with regard to whether or not those four or five springs were sufficient to water his stock and that ground down there? A. Yes, in my opinion they are.

Q. And would the situation be improved any down there if he had any additional springs?

A. No, I couldn't see what good it would do.

Q. And what was your opinion then as to whether or not he had ample water for watering his stock and irrigating the ground down there?

A. It was my opinion that he had ample water now for stock water and irrigating that ground down there with the [110] present springs.

Q. And did you take that into consideration in reaching your opinion as to the valuation of that particular piece of the home place? A. Yes.

Q. You were asked with regard to whether or not you had been accompanied on some of your earlier appraisal trips by other appraisers, namely, Mr. J. R. Sayers, Mr. Bennett and Mr. Robinson. Do you know whether or not the appraisal those gentlemen made of this property here was higher, lower or the same as the figures that you have given to the Court and Jury today?

(Testimony of David W. Dick.)

A. I know that they are all lower.

Q. They are lower than the figures you gave today? A. Yes.

Q. Now, Mr. Dick, I forgot to ask you in my earlier examination, whether you had ever had any actual farming experience yourself?

A. Yes, sir, I had.

Q. Will you briefly explain what that experience was?

A. Well, I was raised on a farm. I helped my father until I was, you might say, a grown man——

Mr. Holden: ——I will object to this, your Honor, as not being proper redirect examination. It wasn't gone into on direct or cross. [111]

The Court: All right, I will sustain your objection.

Q. Mr. Dick, there was some question on direct examination with regard to the value, if any, that you put on the source of the domestic water for the Ruud home down there on the home place?

A. Yes.

Q. Will you tell the Court and Jury just what you considered with respect to whether or not the Ruuds had a sufficient domestic water supply, what type of supply they had, in arriving at the valuation that you put on their home. Did you consider that, and if so, what consideration you gave?

A. I examined the home very closely. It is a modern home with modern facilities and it is tied right in to the culinary water supply and, in abrupt terms, to be cut off that water supply would render

(Testimony of David W. Dick.)

the modern characteristics of the home obsolete. They would have to carry water from outside, from outside, and they would have to use other outside facilities, and naturally, I considered that they had a water supply and a good water supply. Mr. Ruud pointed out the source of this supply in the pipeline.

Q. You considered they had a good domestic water supply? A. Yes, indeed I did.

Q. Will you state whether you included the fact that they [112] had a good domestic water supply in the valuation of \$12,960.00, the figure on the home there?

A. Yes, I did.

Q. During the direct examination you started to explain what you knew about Mr. Ruud's irrigation water, and I don't think that you finished. Now then, do you have the facts, the figures, the records, and so on, in regard to what type of irrigation water Mr. Ruud has to the home place there, and what type of supply?

Mr. Holden: Now, we object to this, your Honor, as not proper redirect examination. Counsel concluded his case as far as this witness is concerned, he has concluded his direct examination. I think this was not gone into on cross-examination at all, however, it may come up later.

The Court: I think you are mistaken on that, Mr. Holden. I think it was brought out on cross-examination.

Mr. Holden: With respect to the springs only,

(Testimony of David W. Dick.)

your Honor, that was the only matter gone into on cross-examination.

The Court: I recall his testifying in regard to a water decree. Whether it was on your cross-examination or not I am not positive. [113]

Mr. Holden: I think, your Honor, the matter will come up later.

The Court: I think you went into it enough so that he could explain it, Mr. Holden. I will let him go ahead and answer.

Q. Will you go ahead, Mr. Dick, and explain to the Court and Jury what you know about Mr. Ruud's irrigation decree up there?

A. The records I will give here are taken from the official records of the watermaster in Idaho Falls, Mr. Crandall, who is District 36 Engineer and Watermaster. He has a staff of people who operate the river for him——

Q. ——Just go ahead and state what those records show, Mr. Dick?

A. The records show, first, that Mr. Ruud has 14.4 feet or 720 inches of Indian Creek Decree, dated July 5, 1900.

Q. And are there any decrees ahead of him?

A. Many, many decrees ahead of him on Snake River.

Q. Now, do you have the records there with respect to the average date during the past years that Mr. Ruud's decree was shut off on the Indian Creek water?

(Testimony of David W. Dick.)

A. I have the dates that his decree was cut off since 1930.

Q. Will you go ahead and tell the Court and Jury what you know about that?

A. July 7, 1930, was when—the date I give will be when his decree was cut off. [114]

Q. Do you have the average of all the years?

A. The average is around July 10 to the 15th.

Mr. Holden: We will stipulate, your Honor, that the record so shows. We intend to show and we will stipulate that the average date when his decreed right as to the 720 inches with the priority of July 5, 1900, the average date when that right is cut is around the middle, I believe the witness said July 15th?

A. Between July 10th and 15th.

Mr. Holden: We will stipulate to that, between July 10th and 15th.

The Court: It is already in the testimony, but the stipulation won't hurt any.

Q. Mr. Dick, so that the jury isn't misled in this matter at all, is it true that Mr. Ruud had access to additional water after his decree was shut off?

A. There is an arrangement on Snake River whereby as long as the water in Indian Creek, and even though his decree isn't good, if there is still water in Indian Creek, he can use that water and pay for the water in exchange out of American Falls Reservoir. In other words, there are people like the Twin Falls Canal Company and the United States Government, who have reserve space in the

(Testimony of David W. Dick.)

American Falls Reservoir, and they put that out on an [115] exchange basis at so much per acre foot, and Mr. Ruud can, as long as there is water in Indian Creek, he can exchange that water by buying water in American Falls on an exchange basis.

Q. Now, then, do the other users on Indian Creek, of Indian Creek water, have the same right on the same arrangement? A. That's right.

Q. And does the priority of the decree have anything to do with who has the first right to use the water that flows in Indian Creek?

A. It does, according to law, yes.

Mr. Holden: Now, will the Reporter read the last question and answer, please?

(Question and answer read by Reporter.)

The Court: The last answer may be stricken.

Q. Now, I am asking you, Mr. Dick, with regard to what the custom has been up there, that is, this informal arrangement that I understand you testified to, that is in determining who has the right to go ahead and buy water out of Indian Creek?

A. Well, there is another decree or two ahead of Mr. Ruud.

Mr. Holden: I move that the answer be stricken as not responsive.

Mr. Furey: Maybe I can shortcut a lot of this, your Honor. I will ask another question. [116]

Q. Mr. Dick, you have had considerable experience with irrigation matters, is that correct?

A. Yes.

(Testimony of David W. Dick.)

Q. Now, then, what, in layman's terms, terms that even I can understand, does this have to do and what does this mean in terms of whether or not Mr. Ruud, in average years, had sufficient water to irrigate all of that home place up there?

A. No——

Mr. Holden: ——May I have that question read?

(Question read by Reporter.)

Mr. Holden: We object to this, your Honor, as no proper foundation has been laid to show that Mr. Dick is an expert, I mean by that a water expert, and there is no foundation laid to show that he know anything about water in Indian Creek, it is incompetent, irrelevant and immaterial, and it calls for a conclusion and this witness has not been qualified to answer.

The Court: The Court may have to eventually instruct the jury in this case that under the dates of priority of decrees, they are entitled to water, when there are other priorities dated ahead of his that a person has no water, if there is no water to fill his later priority then, of course, there would be no [117] water and he would have no water.

Mr. Furey: This witness has already testified as to what the records show in regard to these priorities and, I think, if the Court please, what he has already testified to as to his experience with irrigation district matters and his experience in regard to other irrigation matters, I believe that he is qualified.

(Testimony of David W. Dick.)

The Court: I don't think it will do any harm for him to answer, although I do believe that it is more or less of an expert opinion.

Q. Will you go ahead, Mr. Dick, and answer?

A. Will you just state that again?

Q. Can you tell the Court and jury, on the basis of what you know about the records as to Mr. Ruud's water right, whether or not on an average year, he had sufficient irrigation water to irrigate the whole of tract 41, the home place?

A. Not in my opinion.

Q. Can you state about how far short he would come in an average year?

A. Well, I measured Indian Creek on July 29, 1953, and it contained 600 inches of water, and Mr. McKay was entitled to 320 of that. I measured it again on August the 14th, 1953, and there were 435 inches. I measured it again [118] on August 16th, 1954, and there were 500 inches. I measured it again on September 2nd, 1955, and there were 159.29 inches in Indian Creek, at the Ruud headgate, with other people with 320 inches priority ahead of him. So it was my conclusion that if Indian Creek should decrease every year as it has in the last three years it would become very low at the last of the season and he would not have sufficient water to water the entire property.

Q. But he would have sufficient water to water that better land that you put the higher price on?

A. Yes.

(Testimony of David W. Dick.)

Mr. Furey: That's all; you may recross-examine the witness.

Recross-Examination

By Mr. Holden:

Q. Mr. Dick, do you know when the 1897 decree of water is cut with reference to the date that the 1900 decree of Mr. Ruud's is cut?

A. You say the 1897 decree?

Q. Yes.

A. With reference to the date——

Q. ——With reference to the date of the cutting of Mr. Ruud's decree?

A. They are almost the same time. They would be cut [119] practically the same time, there is not too much difference.

Q. What is the earliest decree on Indian Creek?

A. 1897.

Q. Then it isn't any better, practically no better than the 1900 decree with reference to the date it is cut?

A. On the exchange basis it would be.

Q. I am not saying anything about the exchange, with reference to the date the decree is cut?

A. Well, Mr. Holden, that high decree is a flood-water right, what is termed on the river as a flood-water decree, and there are so many high water decrees that are cut right close to the same date.

Q. The 1897 decree is cut about the same time as the 1900 decree? A. Not too far apart.

(Testimony of David W. Dick.)

Q. Within a day or two?

A. No, not within a day or two, I wouldn't say, but maybe within ten days.

Q. You didn't check the record to determine that?

A. No; not as between those two decrees.

Q. If the record shows that is in within a day or two, you would, of course, accept the record as being correct?

A. Oh, certainly.

Q. It is very close, to your knowledge and recollection, as to the date of the cutting of the '97 decree? [120]

A. Yes, it is close.

Q. Now, then, with reference to the storage water that is available for rental to Mr. Ruud, and to other water users on Indian Creek, have you checked to determine whether or not there is any preference shown to the users of water on Indian Creek, with reference to the right to rent water?

A. I don't think there is any preference.

Q. They are all given the same right?

A. Yes; that's right.

Q. And you are sure of that, are you?

A. That is my understanding.

Q. Do you know what the rental charge is per acre foot for rental of stored water?

A. It is thirty cents an acre foot.

Q. Do you know the average annual fee paid by Mr. Ruud for rental of storage water during the past eight or ten years?

A. I have it from Crandall's office.

Q. What would that amount to about?

(Testimony of David W. Dick.)

A. In 1945 he rented 45 feet.

Q. And what would that amount to?

A. Well, 50 inches running steady for 24 hours is one acre foot.

Q. How much would it cost for that number of acre feet for [121] that year, what rental?

A. It would cost thirty cents times 45 acre feet.

Q. And what does that compute to be? Is that \$13.50?

A. That is about right.

Q. And that is what he paid for rental of water in what year?

A. In 1945.

Q. Is that about what the average has been over the years, according to your investigation?

A. No; he bought 70 acre feet in 1946.

Q. And what did that amount to?

A. I imagine \$25.00.

Q. Is there anything higher than \$25.00 for water rental in any year, to your knowledge?

A. No; that is the highest year; he hasn't rented any water since 1948.

Q. Do you know whether he has used any storage water from 1949 up to 1955?

A. The records don't show that he has.

Q. Do you know whether he did or not?

A. I checked with Mr. Crandall and he said that he had not.

Q. Mr. Crandall told you that he had not?

A. Yes.

Q. And he was sure of that?

A. Yes; I guess.

Q. You are positive of that, are you? [122]

(Testimony of David W. Dick.)

A. Yes; I am positive he told me.

Q. When did you check with Mr. Crandall?

A. I checked with him on the previous years a couple of years ago when I was making the appraisal for Mr. Ruud, I checked with Mr. Crandall and got the information up to 1952, and then recently I checked with him again and got the information for 1953, '54 and '55.

Q. You made the appraisal on the Ruud property in the year 1953, I believe? A. 1952.

Q. Were you there in 1953?

A. Well, Mr. Holden, the 1953 has to do with the upper property, and we only made a supplemental appraisal on some buildings in 1953 on the home ranch.

Q. You were on the ranch in 1953?

A. Yes; I was there in 1953.

Q. What date? A. July the 30th.

Q. Did you see water in the ditches on that date?

A. Yes; there was some water in the ditches.

Q. Did you check the record to see whether or not the decree was cut on that date?

A. Yes; the decree was cut on July 20th.

Q. Where did the water come from that you saw in the ditches?

A. Well, it would have to be on an exchange basis with his neighbors, that could be by agreement. Mr. McKay and [123] Mr. Smith could agree with Mr. Ruud that they would let him use the water.

(Testimony of David W. Dick.)

Q. Now, then, will you check your record and tell us whether their decree was cut on that date?

A. Yes; their decree was cut.

Q. Where would they get their water?

A. Well, it was coming out of Indian Creek.

Q. Out of Indian Creek? A. Certainly.

Q. And all decrees were cut in Indian Creek?

A. Yes, sir.

Q. And what year was it that you saw the water?

A. That was in '53.

Q. But you don't know whether or not that was rental water?

A. It would have to be, yes; it would have to be rental water.

Q. I thought you said that the records showed that they didn't rent any water since 1949?

A. I am talking about Mr. Ruud, there has been water rented by other water users. You understand, Mr. Holden, that maybe one man would go down from this area, Mr. Ruud's neighborhood, and buy some water and share it with his neighbors, and they would pay him, and Mr. Crandall's records wouldn't show——

Q. ——You have the records before you there, Mr. Dick; do [124] you know whether or not the neighbors of Mr. Ruud, Mr. Smith and Mr. McKay, rented any water during the latter part of July of 1952 or '53?

A. I didn't check into their record. I don't know that.

Q. You don't know whether they rented water

(Testimony of David W. Dick.)

or not? A. Not those men, I don't know.

Q. Now, with respect to the rental of water, do you know that it is the practice after the decrees are cut on Indian Creek, that water is available on a rental basis to Mr. Ruud and other water users out of Indian Creek?

A. As long as there is any water in Indian Creek.

Q. And this water, this presumably stored water, rental is figured on stored water in Jackson Lake, is that not a fact?

A. Yes; on an exchange basis with water in the American Falls Reservoir.

Q. Do you know or do you have a record—I believe that you gave some figures there in reference to the flow of Indian Creek, where did you obtain that information?

A. I went to the head of Ruud's ditch and measured the water myself, and they were taking all of the water of Indian Creek on each of those occasions.

Q. You measured it and based it on your own record? A. That's right.

Q. Will you give me the figures that you [125] have?

A. July 29th, 1953, 600 inches. August 14, 1953, 435 inches; August 16, 1954, 500 inches; September 2nd, 1955, 159.28 inches.

Q. And those are the only measurements that you made, is that correct? A. That's right.

Q. And where did you make the measurements?

(Testimony of David W. Dick.)

A. At the Ruud headgate.

Q. You made it at the Ruud headgate?

A. Yes, sir.

Q. And where is that located?

A. It is located a mile and three-quarters or maybe a mile and a half up Indian Creek from the highway.

Q. Does he have a separate headgate of his own?

A. Well, I mean it was a company ditch, the Smith-Keyser—Ruud-McKay ditch, they head together up there.

Q. You measured it twice in the year 1953, the latter part of July and the middle of August. You measured it once in the year 1954, and once in the year 1955?

A. Yes; that's right.

Q. Did you check any records in Mr. Crandall's office with reference to the flow of Indian Creek during this same period or those same periods of time?

A. No; these were my own. I didn't check any other records against that. [126]

Q. You didn't ever check any records in his office?

A. I did regarding these acre feet of storage water that I gave you, I checked them in Crandall's office.

Q. I mean with reference to the flow?

A. No; I didn't.

Q. After the decrees were cut?

A. No; I was there and I got my boots on and got down and measured the water and that's all

(Testimony of David W. Dick.)

there was, there just wasn't any more and so I didn't go to Crandall's office to find out anything.

Q. On July the 29th, 1953, you figured that there were 600 inches? A. Yes.

Q. Who was using that water?

A. It was being divided between the north ditch and Mr. Ruud's ditch, Mr. Ruud was getting some of it. I didn't measure at the diversion, but part was going north to the Smith and the McKay ditch.

Q. Was their ditch different than Mr. Ruud's?

A. I measured the source of the water, but I didn't measure at the divider.

Q. Do you know what the practice is there with reference to the neighbor using all of the water and trading it back and forth?

A. I understood that they have a mutual agreement there and [127] they trade and exchange occasionally.

Q. And as far as you know, on July 29, 1953, Mr. Ruud was using 600 inches of water out of Indian Creek?

A. No; because part of it was being diverted into the north ditch, he probably had half of it.

Q. You didn't measure to see how much?

A. No.

Q. Was it being split on August the 14th, 1953?

A. To my knowledge, yes. I went there to look at it.

Q. Do you have a memorandum on that date showing the division of the water?

A. Yes; I have it here in my book.

(Testimony of David W. Dick.)

Q. It shows that it was split?

A. No; I don't have that memorandum.

Q. What do you have in your memorandum?

A. Just what I have given you.

Q. That is all you have? A. Yes.

Q. And you are basing it on recollection now as to whether or not it was split on those dates?

A. Yes.

Q. But you do know the common practice was to trade it, to use the water, each one to use it all and then to trade it around?

A. I have understood that they traded water.

Q. That is common knowledge? [128]

A. Yes.

Q. On August 16th, 1954, there were 500 inches of water. Now, then, do you know, or can you say of your own knowledge, positively, that Mr. Ruud wasn't using 500 inches of water on August the 16th?

A. Well, at the divider, it was being split again, that is my recollection, and part of it was going north.

Q. And your recollection is that on all of these dates it was being split? A. Yes.

Q. On every date to which you have testified here?

A. Yes; up to the last date, you haven't come to that yet.

Q. And when was the last date?

A. September 2, 1955.

(Testimony of David W. Dick.)

Q. And you remember that of your own independent recollection that it wasn't split?

A. Yes; Mr. Smith was using it all.

Q. And that was in September?

A. September 2nd, yes.

Q. After the crops were in the process of being harvested? A. Yes.

Q. Now, Mr. Dick, this Clinton Report to which you have been referring, is that a Government report? A. The Clinton Report——

Q. ——Just a minute. Is it a Government [129] Report?

A. Yes; a Government feasibility report.

Q. And is it compiled by a Government agency?

A. By a Government engineer.

Q. And who is the engineer?

A. Frank Clinton.

Q. And do you have a copy of the report there?

A. Yes.

Q. Mr. Dick, you attach particular significance to this Clinton Report in reference to the length of the growing season, in valuing the Ruud property?

A. I presumed that it would be official since it came from the——

Q. ——No; I asked, did you pay particular attention and did it have quite an influence on your opinion as to the value, did it, the information with reference to the length of the growing season?

A. Yes; because they quoted the 1894 Weather

(Testimony of David W. Dick.)

Bureau station at Irwin, they secured their information from there.

Q. And that had quite an influence on you in arriving at your opinion? A. Yes, sir.

Q. And I believe that you testified that there were 77 growing days? A. 72. [130]

Q. Then, if that growing season were actually ten or twelve or fifteen days longer, that would be quite a material factor, wouldn't it?

A. Yes; in that particular year, but the average is 72.

Q. I am talking about an average now, Mr. Dick. A. Yes; that is 72.

Q. And if the average was 87 or 89, or along in there, that would be a material factor to take into consideration, wouldn't it?

A. Well, since records have been kept on it since 1894, I wouldn't presume that it would extend another ten days.

Q. I am not asking what you would presume. We will show you the record later. I am asking you if the Government records showed that it extended ten days additional, that would be quite an important factor, wouldn't it?

A. It would be important, yes.

Q. And you would, in estimating your valuation of a fair market value of this property, that would cause you to give it an increased valuation with that additional growing season, wouldn't it? If there were ten days longer growing season?

A. No; it wouldn't.

(Testimony of David W. Dick.)

Q. You wouldn't increase the valuation then if the growing season was ten days longer?

A. It didn't influence me that much; it didn't have that kind of a bearing on my opinion. [131]

Q. Yet you took the 72 days into consideration?

A. As a basis to work on, yes.

Q. Did you actually take this into consideration in 1952? A. Yes.

Q. When did you first look at the Clinton report? A. I would say about 1945.

Q. When did you look at it with reference to the growing season at Palisade or at the Ruud ranch?

A. In 1952.

Q. You had this report available at that time?

A. Yes.

Mr. Holden: I wish to reserve the right to ask a few more questions on this matter after I have had an opportunity to examine the report.

The Court: I just want to call the attention of counsel to the fact that we are moving along pretty slow.

Mr. Holden: But we feel this is quite important.

The Court: Yes; you go right ahead, Mr. Holden.

Q. Now, then, Mr. Dick, you emphasize the consideration that you gave the matters, the matters, that is, which you took into consideration for the purpose of appraising the bottom pasture land, and particularly what Mr. Ruud [132] told you that it was being used for? A. Yes; I did.

Q. Actually, when you were arriving at your fair market value, the figure you placed as the fair

(Testimony of David W. Dick.)

market value, you were basing your opinion primarily on what Mr. Ruud was telling you with reference to the use he had made of it?

A. That's right.

Q. And you didn't use your own independent judgment with reference to the highest and best use to which it could be put?

A. I presumed that he had it at its highest and best, and in my opinion that was its highest and best use, yes.

Q. Did you rely on your own judgment as to its highest and best use? A. Yes; I did.

Q. Did you take into consideration that crops could be raised on that lower pasture land?

A. After a clearing program and a drainage program they could, yes, but it is such a beautiful pasture now, Mr. Holden, that I think it is being used to its highest and best use.

Q. You are basing its highest and best use then for pasture purposes?

A. That's right. [133]

Q. And not what Mr. Ruud told you then?

A. That is what he told me, if I recall.

The Court: We will work a little longer tomorrow so that you will not be taken by surprise, you may be prepared for longer hours.

We will recess at this time until 10:00 o'clock tomorrow morning.

(Testimony of David W. Dick.)

November 9, 1955—10:00 A.M.

Q. Mr. Dick, I just want to ask you one or two more questions in connection with this report. I am referring now to the report that you handed me for examination yesterday in connection with the feasibility report of the Palisades project. This report, I believe you have studied and read and are familiar with, is that right?

A. I read it a long time ago with the exception of that clause referring to the climate and I turned that page down, and I have referred to that recently.

Q. You referred to it recently, you say?

A. Yes, that is the page turned down, Page 4 included in the bound volume here from the National Park Service.

Q. That is the portion of the report which says that the average length of the growing season was 72 days?

A. Yes.

Q. I want to call your attention to another portion of this [134] report, on Page 2, in connection with certain statistics compiled by the Fish and Wildlife Resources, which is a part of the bound volume and a part of the report. On Page 3 thereof, this Government agency states that an average growing season of 81 days—so that in this same report, and I will ask that the Bailiff show this to the witness, at the top of Page 3 thereof, do you see that?

A. Yes.

(Testimony of David W. Dick.)

Q. So this report carries both statements, the one that you referred to here before, and this one which states 81 days? A. Yes.

Mr. Holden: That's all.

Redirect Examination

By Mr. Furey.

Q. With regard to the testimony that you gave as to the growing season, from that report, before, will you just state again where it was indicated that information came from?

A. The only reason that I——

Q. ——Just state where it came from, whether or not that report indicated where they got the information with regard to the frost?

A. It stated that the report came from the Weather Bureau station at Irwin.

Mr. Furey: That's all. [135]

Recross-Examination

By Mr. Holden:

Q. Do you know where the other statement came from—may the witness be handed the document again—you were familiar with this 81 day statement prior to the time that you testified?

A. I hadn't read it, that is, I don't remember even reading the 81 day statement before, but I did refer back to the 72 day statement. I turned this page down and I left it for future reference.

Q. And this statement, this 81 day statement as

(Testimony of David W. Dick.)

to the length of the growing season, is also a statement by a Government agency?

A. I presume it is. I am not too familiar with that. I haven't familiarized myself with it recently.

Q. The length of the growing season to which you referred, if you want to refresh your recollection again, is from the report of the National Park Service. That portion of the report is where the 72 day figure is, is that correct?

A. Yes, sir; I think so.

Mr. Holden: That's all.

Redirect Examination

By Mr. Furey:

Q. Just one more question, Mr. Dick, please. Assuming there were 81 days growing season rather than a 71 day, state [136] whether or not that would make any difference in your conclusion as to the fair market value of the Ruud ranch?

A. No, It would not.

Mr. Furey: That's all.

Recross-Examination

By Mr. Holden:

Q. Both of these records are listed at Irwin, Idaho, are they not?

A. I am not familiar with the one that you referred to, Mr. Holden, that 81 days. I haven't refreshed my memory on that.

(Testimony of David W. Dick.)

The Court: We might save a lot of time if we just put this report in and let the jury look at it.

Mr. Holden: I would be glad to do that.

Mr. Furey: And I certainly have no objection to it.

Mr. Holden: That's all.

Mr. Furey: That's all. Thank you, Mr. Dick.

FLETCHER W. GOURLEY

called as a Witness by the Plaintiff, after being first duly sworn, testifies as follows: [137]

Direct Examination

By Mr. Furey:

Q. Would you state your full name, Mr. Gourley? A. Fletcher W. Gourley.

Q. Where do you live, Mr. Gourley?

A. Idaho Falls, Idaho.

Q. And what is your business or occupation?

A. I am outside field man for the Bank of Eastern Idaho and also livestock, farm and stock auctioneer.

Q. How long have you lived in Idaho Falls?

A. Thirty-five years.

Q. And for how long have you been employed for the Bank of Eastern Idaho as their outside man? A. For the last six years.

Q. Will you explain just briefly what your duties as outside man consist of?

(Testimony of Fletcher W. Gourley.)

A. It is appraising real estate loans and live-stock loans.

Q. For the bank? A. That's right.

Q. Mr. Gourley, have you had any experience as a real estate appraiser other than you have testified to?

A. My work in the sale business over the past years has brought me in contact with ranches and farms and farmers, and through that I have done appraising work for individuals, estates, and so forth. [138]

Q. For how long a period?

A. For the past thirty years, I would say.

Q. In what areas has most of your appraisal work been done?

A. Well, in Bonneville County, in the Salmon River country, in the Swan Valley and up in Grand Valley, and all of that country through there.

Q. You have done private appraisal work for individuals in the Swan Valley for the past thirty years or during that time, have you?

A. Yes, sir.

Q. You say that you have appraised for estates, will you just state briefly, what does that type of work consist of?

A. Well, it is just where the Administrator of an estate will appoint you to go out with three, possibly three, other appraisers, and appraise estates.

Q. In the business as you have testified to, have you had occasion to become familiar with land

(Testimony of Fletcher W. Gourley.)

values generally in the Idaho Falls, Bonneville County and Swan Valley area? A. I have.

Q. And over what period of time has that familiarity with the values extended?

A. I would say for the past twenty years.

Q. Have you had any actual farming experience yourself? [139]

A. I was raised on a farm.

Q. Will you state whether or not you have done any appraising in the Bonneville County area for the Bureau of Reclamation? A. I have.

Q. Over what time?

A. The past three years.

Q. Can you estimate how many ownerships you have appraised?

A. Well, I would say fifteen, possibly it would be sixteen.

Q. And what type of properties would those be, with respect to whether they were residential properties or farming properties?

A. They would be farms, large and small, and some would be irrigated and some would be dry, and there would also be some small stock ranches.

Q. Have you appraised what has been referred to here as Tract 41, Tract 77 and Tract 34 in this case? A. Yes, I have.

Q. At whose request?

A. The Bureau of Reclamation and your own.

Q. And did you visit those lands in making your appraisal? A. I did.

Q. And will you tell the Court and Jury when

(Testimony of Fletcher W. Gourley.)

you visited them, how long you were on the land on each occasion?

A. On October the 20th, 1952; July 28th and 29th, 1953; March the 29th, 1955, and September the 7th and again on [140] September the 9th of 1955.

Q. Could you estimate approximately how much total time altogether, you have put in going over those properties and examining them?

A. I would say five days altogether.

Q. How did you go over this land, did you drive through, or go over it on foot, or how?

A. We walked.

Q. You walked over the land? A. Yes.

Q. And in making your appraisal were you able to find the boundary lines of each tract, were you able to find where the boundary lines were?

A. Yes.

Q. How did you do that?

A. By maps furnished to us by the Reclamation Service and also by the owner.

Q. By Mr. Ruud? A. Yes, that's right.

Q. While you were appraising that property, did Mr. Ruud at any time go over it with you?

A. He did.

Q. He accompanied you in examining the property? A. Yes.

Q. Now, will you state whether or not he discussed that appraisal with you, state whether he discussed with you [141] his feelings as to the values of the ranch? A. Yes, he did.

Q. Will you describe briefly to the Court and

(Testimony of Fletcher W. Gourley.)

Jury what the technique or procedure was which you used in appraising that property?

A. Well, we took into consideration the location, where it was available to schools, to an all-winter highway, we considered the texture of the land, what it would be adopted for, the available water, which portions were irrigated and which wasn't, and the lay of the ground, the state of cultivation, and I think that would be about it.

Q. Now, Mr. Gourley, directing your attention particularly to Tract 77, which is the Alpine place, do you have an opinion as to the highest and best use that tract could have been put to on March 4, 1955, or within a reasonable time thereafter?

A. Yes.

Q. And what is that opinion?

A. I would say it would be more adapted to pasture.

Q. And what is the basis of your opinion?

A. Because it is not good cropland, the texture of the soil is such that I think if a grass could be found, and I am sure there are such grasses which could be seeded, [142] I think it is much more adapted to pasture.

Q. What is the texture of the soil?

A. The soil is very gravelly.

Q. Gravelly?

A. Yes, it is thin and very gravelly.

Q. How many acres are in that tract?

A. There is 238.87.

Q. Are you sure of that, Mr. Gourley?

(Testimony of Fletcher W. Gourley.)

A. I beg your pardon, it's 328.87.

Q. Will you just briefly tell the Court and Jury what you observed as to the physical characteristics and topography of that ground in addition to what you have just testified to?

A. Could I use the map to do that?

Q. Yes, just very briefly, Mr. Gourley.

A. This being the highway (indicating) and this, as you know, being Snake River, and the land runs—this is Alpine—and the land runs, as you can see, west here and here and here. Here are shown the boundaries of the land. The texture of the land through this is very gravelly and very thin soil. Here you have a little better soil and a little more soil. I would say that there is an eighty acre piece in here that is a little better soil. This here is quite gravelly, and this here is designated as a rocky ridge, through here, mostly rock and sagebrush. Down here, [143] (indicating) is some river bottom land that is very good, very good land. This is all dry land, however, and this in here is a dry ditch that runs through here. I think that is it.

Q. Mr. Gourley, bearing in mind that the definition of fair market value is the amount of cash or its equivalent that a person willing, but not required to buy, and that a person willing, but not required to sell, would accept, and keeping in mind the highest and best use which you think that land could be put to, keeping those definitions in mind, do you have an opinion as to the fair market value of Tract 77, as of March 4, 1955?

A. I do.

(Testimony of Fletcher W. Gourley.)

Q. And what is that opinion?

A. \$19,500.00.

Q. And this is Tract 77? A. Yes.

Q. How much was that? A. \$19,500.00.

Q. Now, directing your attention to Tract 41, that is the home place, the place where the buildings are, and designated on Plaintiff's Exhibit Number 2. Do you have an opinion as to the highest and best use that land could be put to on March 4, 1955, or within a reasonable time thereafter? [144]

A. Yes.

Q. And what is that opinion?

A. It is adapted to hay, small grain and pasture.

Q. On what do you base that opinion?

A. It has got more soil, it is irrigated, that is, a portion is irrigated. Good water, good soil and good pasture.

Q. Will you just step down here to the map and tell the Court and jury what you observed as to the topography of that ground?

A. I will start out here (indicating) and I might say that this little white spot here, this is two acres of land, and it is in controversy here. This is about the same kind of land as the rest that is set out here (indicating). This piece here runs up toward the mountain and is very good soil, good mountain soil, and it comes down here and here is a break in here. This corner is very good soil and then this soil here runs quite gravelly. It starts with gravel here and is quite gravelly through here, in streaks, running out

(Testimony of Fletcher W. Gourley.)

in a little heavier soil and then back into streaks of gravel, and so it is gravelly—streaked through here. This here is some sagebrush and rocky land in here. This is a little corner of hillside grazing land, a small fraction of an acre. When you get down here, you have dry land, this is dry land and these [145] two portions here are dry land. Starting over here at this point there is a swale that runs through here and this portion above the swale is dry, and from there down you've got a good farm, you have an excellent farm there. You have a good farm down past the homestead and over here as far as, well, about in here. Then you start in again with pea gravel, which is quite heavy again, and that runs down into this portion here, but from here down I would say it is a good farm; it is irrigated and irrigated well. The yellow portion, as you see, is timber pasture and a good pasture, it has a good stand of grass and is a good pasture. Under the hill about here, there is a good big spring, and that comes out in several places in the hill and it was dammed up here and a reservoir—a little reservoir made there with considerable water, and that acted as a sub for quite a lot of this pasture, and also there were ditches off from it, where it had been irrigated and where it had subbed from these ditches.

Q. Is that pasture well irrigated?

A. That pasture is not—well, it is irrigated, portions of it. Some of that pasture would be difficult to irrigate because of its rolling nature. It would not be

(Testimony of Fletcher W. Gourley.)

very easy to irrigate a lot of it, however, that land will sub. [146]

Q. Did there appear to be plenty of water for that pasture?

A. I wouldn't say that—well, I think that water is available, but I think it would be hard to get it on portions of that.

Q. But for pasture purposes—

A. —It is very good, there is some timber and some brush and I would say it is very good. Over in this end it is dry and over in this portion we find sagebrush. This is dry pasture in here, but the rest of the pasture is very good. This is the homestead in here and this is Highway 26 going by here. It is an all-weather highway and a very good National Highway.

Q. Now, Mr. Gourley, bearing in mind the same definition of fair market value that I gave you a moment ago, and keeping in mind your opinion as to the highest and best use to which that land could be put on March the 4th, 1955, or within a reasonable time thereafter, do you have an opinion as to the fair market value of Tract 41, as of March 4, 1955?

A. I do.

Q. And what is that opinion?

A. \$99,900.00.

Q. Now, Mr. Gourley, would you examine your figures there again, are you sure that you are giving the figures, both as to Tracts 41 and 77. Will you examine your notes again? [147]

A. I could be mistaken.

(Testimony of Fletcher W. Gourley.)

Q. Well, now, will you see whether you are giving me the right figure?

A. Maybe I have my figures tangled up a bit; I will take a look here.

Q. Do you have them?

A. That is for the property alone, now, do you want the improvements in there.

Q. I want the entire property, including the improvements.

A. That is \$138,250.00.

Q. Now, will you look again at your figures on Tract 77. You stated before that your opinion of the value was \$19,500.00. Now, will you tell us, did that include improvements?

A. No.

Q. I want your figure as to the fair market value of that tract, including the improvements.

A. That is \$28,700.00—I was giving you the price of the land.

Q. I thought there was some mistake, Mr. Gourley. Just to eliminate any confusion here, let me ask you, what is your opinion as to the value of Tract 77, as of March 4, 1955, the Alpine place, including the improvements?

A. \$28,700.00.

Q. And your opinion as to Tract 41, including the improvements? [148]

A. \$138,250.00.

Q. Now, directing your attention to the little two acre tract up there, which has been designated as Tract 34, do you have an opinion as to the highest and best use to which that could have been put on March 4, 1955, or within a reasonable time thereafter?

A. Yes, sir.

Q. And what is your opinion?

(Testimony of Fletcher W. Gourley.)

A. I valued it the same as the other land, I think it was \$260.00.

Q. \$260.00? A. That's right.

Q. But my question, Mr. Gourley, was as to the highest and best use, is there anything unique about that piece or is it just about the same as the other?

A. There is an old abandoned log building on it that is about to fall down.

Q. Is it about the same type of land?

A. It has been used as a dump ground at some time, but the land would be the same, yes.

Q. And the figure you put on it is the same as you gave to the adjoining land?

A. That's right.

Q. Now, Mr. Gourley, will you explain just briefly, the factors that you took into consideration in arriving at [149] these figures of fair market value that you have just given us?

A. Yes, I took into consideration the condition of the land and what it would grow.

The Court: Mr. Furey, before you get away from these figures, will you have him give you a total figure?

Mr. Furey: I was planning to do that.

The Court: I am sorry, just go ahead.

Q. Mr. Gourley, will you give us the total figure which you consider to be the fair market value of the whole Ruud ranch, including the three tracts, as of March 4, 1955? A. \$166,950.00.

Q. Now, will you just go ahead with the other?

A. Yes, the condition of the land as to its grow-

(Testimony of Fletcher W. Gourley.)

ing ability, and the water, and the difference between the dry land and the irrigated land, and the state of cultivation which it was in.

Q. What about access to markets, schools and so forth, what is the situation up there in regard to that?

A. It is very good. I am quite sure there is bus service daily and mail service. There are school buses. I think [150] there is a high school at Ririe, which I think is about 46 miles, 46 or 47, and it is an all-winter road, always open.

Q. What is the situation as regarding utilities, telephones and so forth?

A. It has power and telephone lines.

Q. And your opinion again as to the total fair market value of all of the Ruud ranches that are involved in this action?

A. \$166,950.00.

Mr. Furey: You may examine, Mr. Holden.

The Court: Before we get on the cross-examination, I don't think that adds up to the total, the figures you have heretofore given.

Mr. Gourley: Then I may be mistaken again.

Q. (By Mr. Furey): Mr. Gourley, go ahead and examine your figures, again, will you, please?

A. Yes.

Q. Have you added that up, Mr. Gourley?

A. Yes.

Q. And then your opinion as to the fair market value of all of the Ruud ranches involved is [151] what?

A. \$167,210.00.

Mr. Furey: Now, you may examine, Mr. Holden.

(Testimony of Fletcher W. Gourley.)

Cross-Examination

By Mr. Holden:

Q. Mr. Gourley, are those the figures from the five appraisals? A. No; that's my figures.

Q. And those are your figures then of what date?

A. These are my figures of—well, they would be my figures of now.

Q. Of today?

A. That's right, because I've added \$8,000 for granaries and so it has made my figure of now.

Q. But your figures are as the date of your last appraisal then? A. Yes.

Q. And you have revised your figures at different times when you went over the property?

A. That's right.

Q. Now, who went with you on the appraisal of the Bert Ruud property, what other appraisers were there?

A. There were Jim Bennet, Alvin Robinson and Dave Dick.

Q. Who is Alvin Robinson?

A. Alvin Robinson was employed as an appraiser by the Reclamation Bureau. He lives at Alpine, or rather he [152] lives at Afton, Wyoming.

Q. What business is he in, do you know?

A. Yes; he is in the implement business at the present time.

Q. Former Vice President of the Bank at Afton?

A. That I don't know, but he used to be in the livestock and farm business.

(Testimony of Fletcher W. Gourley.)

Q. You know that he used to be in the bank at Afton?

A. Well, he has a brother in the bank and he probably was connected with the bank. I don't know what his capacity was.

Q. And who else?

A. Jim Bennett and Dave Dick.

Q. Are you an officer of the Bank of Eastern Idaho in Idaho Falls? A. I am.

Q. And what office do you hold?

A. I am a vice-president.

Q. Now, you appraised the land of the Alpine property of Mr. Ruud's on the basis of pasture land, is that what I understand? A. That's right.

Q. Are there any crops growing on that land?

A. Yes.

Q. Will you tell the jury just what valuation you gave to that land on an acre basis?

A. Do you want the average of it or shall I break it down? [153]

Q. Yes; break it down.

A. There is 12.21 acres of bottom land that I pointed out that is good land. It is farm dry land, however, but it is pretty good river bottom land.

Q. That's this area here?

A. That's right. I gave \$100 an acre for it; it's a small tract, not too easy to farm. It sets there by itself and there is a four acre tract up there above the buildings at Alpine that I valued at \$100 an acre, because it lays good and has a little better soil.

(Testimony of Fletcher W. Gourley.)

Q. Where is that located?

A. Up in the corner above that red mark along the highway, just out from the highway.

Q. How many acres? A. Four acres.

Q. This four acres here (indicating)?

A. Yes, sir.

Q. And you gave that what value?

A. I gave \$100 an acre for it. Now, there is 5,120 acres of farm land there that is off by itself, I don't know just why, it is the same sort of land, it's gravelly, very gravelly, and I allowed \$60 an acre for it.

Q. Where is it located?

A. It is also in that same area. [154]

Q. Will you designate it and point it out on the map so that the jury will know?

A. This five acres lays right in here.

Q. Now the five acres was in what area again?

A. In this area.

Q. And the valuation in that is how much?

A. Sixty dollars.

Q. You say it is quite gravelly?

A. That's right.

Q. About like the river bottom gravel?

A. It is not cobble rocks, but very heavy pea gravel. It is possible you might find a rock occasionally, but it is not cobble rocks, it is very heavy gravel.

Q. Is it pea gravel?

A. Yes; it would be pea gravel. I guess it would

(Testimony of Fletcher W. Gourley.)

be coarser than pea gravel but that is what we call it.

Q. Then you don't mean what you say, it isn't pea gravel?

A. No, it isn't nor it isn't cobble rocks, the term is pea gravel. It is used a little recklessly, but that is what we mean; it is not as fine as peas and it isn't cobble rocks.

Q. You don't mean that it is pea gravel?

A. No; that's right.

Q. Now, on that one five acres, there is no soil mixed in with that gravel at all? [155]

A. Not very much soil.

Q. It is all gravel?

A. You will find a showing of soil in all of it, yes; there will be a showing of soil.

Q. Is the soil streaked, you mean there are streaks of soil?

A. No; it will all be the same texture.

Q. You mean there is some soil in the five acres?

A. Yes; a little soil.

Q. Now, what else is there?

A. There is 215.77 acres of land that lays straight, I can show you here, it lays in this area.

Q. How many acres?

A. 215.77; that lays in here and it is fairly heavy gravel. It's pretty solid gravel, and we have eighty acres here that you will find more soil mixed into the gravel.

Q. Where is that eighty acres?

A. That's right up here.

(Testimony of Fletcher W. Gourley.)

Q. You call that eighty acres?

A. Well, there is eighty acres in this location here, there is eighty acres and there is a little more soil in the gravel.

Q. That's pretty heavy gravel, too, isn't it?

A. Yes. [156]

Q. But there is a little soil interwoven?

A. Yes.

Q. Is that pea gravel?

A. That is coarser than pea gravel.

Q. Is it coarser than this gravel down here (indicating)? A. It would be about the same.

Q. There isn't much difference then between these two parcels of land, this one down here and this portion up here (indicating)?

A. Yes, there is a difference.

Q. I think you stated that the gravel was coarser? A. There is more soil in this.

Q. What type of soil, did you examine the soil?

A. Yes, it is ordinary soil, just ordinary valley soil, just ordinary land.

Q. What is the difference in the soil of the two?

A. Well, one has more soil than the other.

Q. Is that the only difference in the two parcels?

A. Yes.

Q. But the soil is the same type of soil in both parcels, is that what you mean?

A. Yes, and that eighty acres I gave \$80 an acre for.

Q. Which one is that?

A. The one I just pointed out.

(Testimony of Fletcher W. Gourley.)

Q. Up here (indicating)? [157]

A. Yes.

Q. And how much did you allow for this down here? A. \$60 an acre.

Q. Now, what valuation did you give on any improvements on this property?

A. The improvements consist of a cafe building 18 by 26, a frame building, composition roof, cement foundation, and it has some living quarters in the back, and then it has a little counter and some stools or what have you, and a little kitchen and I gave \$3,500 for it.

Q. Water in the building? A. Yes.

Q. Are there any other improvements in the area?

A. Yes, behind this building is an outside toilet that we gave \$30 for, and there is a hotel, a little hotel there with seven rooms and a bath, and it is 47 by 27, a frame building with cement foundation. I gave \$4000 for it.

Q. Plumbing in it? A. Yes.

Q. And heat in each room? A. Yes.

Q. How many baths?

A. I saw one bath. There could have been another shower but I only saw one bath. [158]

Q. How many toilets in there? A. Just one.

Q. You are sure of that? A. Yes.

Q. Electricity in the building? A. Yes.

Q. Lights in each room? A. Yes.

Q. What valuation did you place on the land where these buildings were located?

(Testimony of Fletcher W. Gourley.)

A. I think that tract there is about two acres if I remember right, or a fraction thereof, an acre and a half and I gave \$200 for it.

Q. For the two acres?

A. Yes, but it is 1.50 acres, that is what it is.

Q. That is where the buildings are located?

A. Yes, sir.

Q. Did you give any valuation for additional acreage for townsite purposes? A. No.

Q. Did you give or take into consideration that the highest and best use for land bordering U. S. Highway 26 and U. S. Highway 89 at the junction, that it would be best suited for townsite purposes?

A. Yes, I took it into consideration. [159]

Q. And what amount of land then, in your opinion, would you arrive at for townsite purpose?

A. I didn't allow any land for townsite purposes.

Q. Just tell the jury where the hotel is located with reference to the highways.

A. Well, yes; I think I can——

Q. ——which highway is it adjacent to?

A. 26.

Q. Is there any other highway in that area?

A. Yes, there is a highway that comes up and forms a junction from below, highway 26 goes by, past it here and I would say, maybe 300 feet there is another highway comes in there from Wyoming. It goes up the canyon to Jackson, Wyoming.

Q. And that comes in through this area here?

(Testimony of Fletcher W. Gourley.)

A. That's right, and that junction has been there for several years.

Q. Then this property is located on the junction of these two highways?

A. It would not be on the junction, it would be on 26. The junction comes in below the town a little bit, but the junction is there.

Q. Are both highways paved highways?

A. Yes.

Q. Do you know where they lead to from that location?

A. Yes, the highway from Jackson goes out through the [160] valley.

Q. Out through what valley?

A. Out through Star Valley, and it is the main route to Salt Lake City. It comes up through Alpine and goes up the Snake River Canyon to Jackson, Wyoming, and on to Yellowstone Park.

Q. Which way north do the highways go, where do they take you?

A. You mean 26 or the other?

Q. Any of them.

A. It's the main route to Yellowstone Park through Jackson.

Q. Where is the other one?

A. The other, Highway 26, is a National highway and comes to Idaho Falls and on through and then it follows the other highway up the canyon.

Q. Then these are both important highways?

A. That's right.

(Testimony of Fletcher W. Gourley.)

Q. And where is this property located with reference to the state line?

A. The state line runs along the highway, the highway is the dividing line. There is some business on the east side of the highway, and this particular property we are talking about is on the west side. Highway 26 goes between them and that is the state line.

Q. Did you observe any springs on any of the Alpine property [161] of Mr. Ruud's?

A. No, I didn't. Mr. Ruud told me that there was a spring there, but at the time we were there we didn't go down to the spring. It came down under the hill, he told me.

Q. You never checked the spring at all?

A. No, we didn't go to the spring.

Q. Is there a well on the property?

A. Yes.

Q. You did check the well?

A. Yes, there is a very good well.

Q. Now, with reference to the home ranch, what valuation did you place on the various classifications of the home ranch?

A. I classified this ranch in about two classifications. There was a little variation in it; not too much. I tried to be fair in the classification to the best of my ability. I took this tract here on this side of the road (indicating), these two little tracts here, and this tract here, this tract above the ditch here. I tried to pick out the land that didn't show irrigation, that was dry. I tried to classify that and so I took those, this piece here, and I went down to

(Testimony of Fletcher W. Gourley.)

this corner here, the reason I took this corner here was that it is quite aways from the water, although it could be irrigated some. It is very gravelly, and that classification run [162] 267.50 acres. That is land that I tried to segregate, but I termed it as dry land, which hadn't showed irrigation. I segregated that from the irrigated land and that I gave \$130 an acre.

Q. Did you value that just on the appearance of the property when you were there and appraised it with respect to whether or not it was irrigated?

A. I appraised it on just what I saw, just the way I saw it. It showed no signs of irrigation, and so I appraised it——

Q. You didn't check to see whether it had been irrigated?

A. There were no signs that it had.

Q. You didn't make any further examination?

A. No, only just what I saw.

Q. You didn't make any further investigation to see if there was a water right decreed to that?

A. No.

Q. That wasn't an important factor?

A. No.

Q. All right, just go ahead.

A. So then I took from this swale in here, that was good land excepting 39 acres in here. Now, this land in here is good land, sufficient water and capable of producing good crops.

Q. How did you distinguish sufficient water for that land? [163]

(Testimony of Fletcher W. Gourley.)

A. From the ditches and from the dikes and the way it had been irrigated, you could see and, of course, you could see the difference in the crops, and you could see the ditches and the dikes were provided for.

Q. You were basing your valuation on the use to which you believed that Mr. Ruud was putting the land to as its best use?

A. Ask me that question again.

Q. Did you place your valuation on this property taking into consideration as the principal factor, the use to which Mr. Ruud was putting the land?

A. That's right.

Q. That is the main thing you took into consideration?

A. That's right.

Q. And you didn't project to determine whether it could have a higher use?

A. I took that into consideration.

Q. But the principal factor was just what Mr. Ruud was doing with it and the way you observed it?

A. That's right.

Q. Proceed then.

A. For this good land here I gave \$200 an acre, for 229 acres of irrigated land.

Q. If I interrupted, go ahead.

A. There is 39 acres here that runs heavy to gravel, and [164] your gravel gets a little heavier as it runs in this direction.

Q. The peas get larger?

A. Yes, the peas get larger. It runs from fine to coarse gravel, not pea gravel.

(Testimony of Fletcher W. Gourley.)

Q. It is not pea gravel?

A. No, pea gravel is the term we use.

Q. It is more like the river bottom in there?

A. No, I wouldn't say that, but it is gravelly, that land I gave \$150 an acre for.

Q. Is there any soil on that land along with the gravel? A. Yes.

Q. Is there any other classification?

A. Here comes your river bottom land and I would say it is being used for what it is mostly adapted for, it is a good pasture, it is kept good, I would say it has not been overgrazed, it is good pasture, that is 106.86 acres, and I gave \$125.00 an acre for that.

Q. Did you take into consideration in arriving at the valuation on that yellow area there as to whether or not it could be farmed? A. Yes.

Q. You took that into consideration?

A. Yes, sir.

Q. Did you make any investigation with Mr. Ruud to determine [165] whether it had been farmed? A. No.

Q. You didn't check that? A. No.

Q. You valued it entirely as a pasture?

A. I would consider it as more valuable for that?

Q. It is a good type of soil, however?

A. Yes.

The Court: We will take a fifteen minute recess at this time.

(Testimony of Fletcher W. Gourley.)

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Q. Is there anything else you care to say with reference to the various soil classifications of the home ranch? A. No, I think not.

Q. I believe you testified that there were some springs in the area of this yellow strip through here? A. Yes.

Q. Do you know at which portion of the yellow strip those springs arise?

A. I think I can come close to showing you there. I would say that they come in just about this section here.

Q. That is your best judgment?

A. If I remember right.

Q. Will you mark that with a pencil so that we can know [166] where you locate them to your best judgment? A. If I remember right.

Q. Will you mark that with a pencil so that we can know where you locate them to your best judgment?

A. If I remember right about there (indicating).

Q. Did you take into consideration in placing the value on that yellow strip of property, the amount of water that flows from those springs?

A. Yes, sir.

Q. Is there a continuous flow of water?

A. Yes, I think so.

Q. Did you make any effort to ascertain the flow of those springs? A. No.

(Testimony of Fletcher W. Gourley.)

Q. Do you have any opinion as to the amount of water from those springs?

A. The only thing that I could say was that there was quite a lot of water. In a matter of inches I wouldn't attempt to say.

Q. Mr. Gourley, did you give any special valuation to the ranch home? A. Yes.

Q. What valuation did you place on the home?

A. On the ranch house I gave them \$14,000.

Q. Did you give any special valuation on the garage? [167] A. Yes.

Q. What valuation? A. I gave \$800.

Q. Do you know what type of construction the garage is? A. Yes.

Q. Is it on a concrete foundation?

A. Yes, and covered with shakes, similar construction to the house.

Q. Is it a double two-car garage? A. Yes.

Q. Did you give any special valuation on the granary? A. Yes.

Q. What valuation? A. \$2800.

Q. What type of construction was the granary?

A. It is on a cement foundation and made with timbers flat and had a pretty good machine shed adjoining, leaning to it.

Q. Did you place a separate valuation on the machine shed?

A. No; I placed a valuation together on these.

Q. I believe that you testified that in the past three years you have been appraising various properties in this area? A. Yes.

(Testimony of Fletcher W. Gourley.)

Q. How many properties have you appraised in connection [168] with this project?

A. I would have to go back and count those, but——

Q. ——approximately?

A. I would say fifteen properties anyway.

Q. And are they located in the area of the Ruud home ranch? A. Yes.

Q. And your appraisals have all been made for the Bureau of Reclamation? A. Yes.

Q. For the Government? A. Yes.

Q. And in making these appraisals you have taken into consideration the various classifications and types of soil? A. Yes.

Q. And have you attempted and tried to keep the valuation of the various classifications somewhat along the same line? A. Yes.

Q. As to all of the property?

A. That's right.

Q. With reference to the dry land on the Ruud home ranch how many acres did you say there was of this dry land? A. I figured 267.50.

Q. Did you make any investigation to determine whether or not the practice in the area of Grand Valley is to [169] farm that land each year?

A. The practice in the whole area is not to farm it each year, but to summer fallow.

Q. And you are positive of that? A. Yes.

Q. And is that based on your own observation?

A. Yes.

Q. Entirely on your own observation?

(Testimony of Fletcher W. Gourley.)

A. Yes.

Q. And you didn't make any inquiry of property owners to find out what the practice was?

A. Yes, in visiting with the property owners that we had previous dealings with, that was the practice with the better farmers.

Q. Was that the practice on the McKay ranch?

A. No.

Q. You say it was not?

A. The McKay ranch was an irrigated ranch.

Q. Was there any non-irrigated land on that ranch? A. Very little.

Q. There was some? A. It was very little.

Q. Was it the practice on the Smith ranch?

A. No, the Smith ranch was mostly in alfalfa hay and pasture. They also irrigated a great part of that [170] ranch, especially where they raised small grain.

Q. You don't know whether Smith let his land lay idle or not?

A. No, he had irrigated land and raised hay and pasture and his grain land, which you ordinarily summer fallow, was irrigated land.

Q. Did you check with Mr. Ruud to see what the practice was with reference to his home ranch?

A. No.

Q. Did you check with Mr. Ruud to see what his practice was with reference to the Alpine Ranch? A. No.

Mr. Holden: That's all.

Mr. Furey: That's all. Thank you, Mr. Gourley.

E. L. NEWELL

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Furey:

Q. Will you state your full name?

A. Edwin L. Newell, commonly known as Todd.

Q. Where do you live, Mr. Newell?

A. At Emmett, Idaho.

Q. How long have you lived there? [171]

A. I have only lived in Emmett for the past two years, but I have lived out at Ola, which is thirty miles out of Emmett, since 1918.

Q. What is your business or occupation?

A. Farmer and stock grower.

Q. How long have you been a farmer and stock grower?

A. Well, since I became of age I have been in the farming business and stock business constantly.

Q. And what period of years would that cover?

A. That has been about 44 years.

Q. During that period, what type of farms and ranches have you operated?

A. I have operated dry farms, also irrigated farms, and then I have run livestock on dry grazing land and on the public domain.

Q. Are you still operating on a part-time basis a ranch or farm, Mr. Newell?

A. Yes, I am still running about 250 brood cows and I have the land and the range to carry those cows.

(Testimony of E. L. Newell.)

Q. How big a ranch is that, Mr. Newell?

A. Well, I think deeded at this time I only have about sixteen or seventeen hundred acres.

Q. During the time that you ranched or farmed there, what has been the number of cattle that you have run? A. The number? [172]

Q. Yes? Just give the jury an idea of the experience you have had in running cattle and ranching?

A. The most cattle was about 700 head. I had the land, facilities and range rights to carry those the year round, and at that time I owned about 4000 acres of ground, partly irrigated, so that I raised my own hay, and partly dry. I farmed some dry land, raised grain and raised alfalfa and the balance was in range.

Q. And during this forty year period, you have been making your living from ranching and farming and running cattle, is that correct?

A. That has been my principle occupation, but I have done a few other things.

Q. During that period have you had any other occupations or have you had occasion to do any real estate appraising? A. Yes, I have.

Q. Will you just explain briefly to the Court and Jury what your experience as a real estate appraiser has been?

A. My first experience was as County Commissioner of Gem County. I was on the County Board for twelve years, and during that time we purchased

(Testimony of E. L. Newell.)

some land for road right-of-ways, and so forth, and, of course, sold some county land, and, of course, I was on the Board of Equalization during those years; in 1940 I was [173] employed by the Bureau of Reclamation to appraise land in the Cascade Reservoir site, which is in Long Valley, Idaho. There is 27,000 acres of farm land and grazing land in that area. I believe that there was practically 100 ownerships in that group. Then I was employed to appraise land under the Anderson Ranch Dam for the Bureau of Reclamation. There was practically 8,000 acres of farm land and grazing land in that area. I don't remember the number of ownerships in that. I was then employed by the Idaho Power Company to appraise land under what is known as the C. J. Strike Dam. That is on the Snake River over near Bruneau, Idaho. I appraised several large cattle spreads in that outfit, I don't remember the number of acres involved. Then I was employed by the Army Engineers to appraise land under the Lucky Peak dam, that is directly above Boise, Idaho, and I appraised several of the larger operations under that dam. I have also appraised considerable land for crop damage for the Bureau of Reclamation where canals or things of that sort would destroy a bunch of crops or damage a lot of land. I would appraise the damage done. And I have had some other similar appraisal experience.

Q. During your ranching and your farming operation I presume that you had occasion to raise various crops on the farm? [174]

A. Yes.

(Testimony of E. L. Newell.)

Q. Did you raise grain crops?

A. I raised grain and hay, both wild hay and tame hay.

Q. What types of grain did you raise on your ranches or farms?

A. Barley, wheat, oats, all small grains.

Q. Did you have any farming experience prior to the time that you started on your own farm?

A. I was raised on a farm, I have been on a farm all of my life.

Q. Then your whole life has been in the ranching and farming game, is that right?

A. That's right.

Q. I will ask, Mr. Newell, whether or not you have appraised tracts 41, 77 and 34, comprising the Ruud ranch?

A. Yes, I did.

Q. At whose request?

A. At your request.

Q. Did you actually go on those tracts?

A. Yes, sir.

Q. Will you explain when you went on them and how long you were on the tracts each time?

A. The first time I went on Mr. Ruud's place was on March 30, 1955.

Q. This year? [175]

A. Yes, '55, this year. At that time there was snow in the area, approximately three feet of snow. The highways were open but the by-roads and the side-roads into the farms and so on were not open, so that all I could do at that time was to gather what information I could get from people in the area and to make what observation I could from the

(Testimony of E. L. Newell.)

highway. I never went onto the property at that time.

Q. What investigation in regard to people in the area did you make at that time?

A. It was hard to get to the ranches and places to talk to people on the ranches, but I talked to some of the people from the Bureau of Reclamation and I talked to Mr. Sayer who was a former appraiser on that project, and at the little place where we stayed in Swan Valley, my wife and I were together there. I talked to a man by the name of Dickman, I believe; he was a farmer in the area. I really didn't have too much of an opportunity to talk to people on that trip. The next trip was on May the 20th, 1955. At that time I was with a man named Jerry Carruthers. I visited Mr. Ruud's place on the day of the 20th of May, but I didn't make an extensive investigation that day of the place, it was more or less in a general way, and then I went across the river and investigated some other properties that I [176] was going to look at at the same time. On the 21st of May I went back to Mr. Ruud's place and when I first went there he was not at home; he was at Alpine, I believe, but his wife was there and she asked us in the house, and showed us through the main dwelling house; by that time Mr. Ruud had come back and we went out in the field with him and discussed all of the problems that we could think of in regard to the properties until noon. We had lunch with Mr. and Mrs. Ruud and spent most of the afternoon on the property with Mr. Ruud. The next

(Testimony of E. L. Newell.)

day I spent my time between Mr. Ruud's and Mr. Bagley's place across the river, and in going over the area, the entire area as much as we could, to gather as much sales information as we could and as much other information as we could about the general operation in that area, farming operations. We talked to some farmers and visited where there had been some land sales and got all of the information that we could. Then later on—first, I will go a little further on that time in May; they were just putting in the crops and if I recall right there was a part of Mr. Ruud's grain that had sprouted, it started through the ground, and the other portions of the field had not been seeded yet. I didn't make an appraisal at that time except to make my notes and everything like that, and I waited to go back when the crops were near maturity. [177] I went back on August the 10th, and at that time I believe I was with you, Mr. Furey, and I visited Mr. Ruud's place. I talked with Mr. Ruud, and I walked over the property with him and got all of the information that we could from him about his operations, his opinion of the best use of his ground, and so forth. At that time the grain was fairly well toward maturity. The barley was headed out in nice shape in the dough at that time. It was a fairly good time. I thought, to pass an opinion as to what the yield would probably be on the ground. After that trip I did make my final appraisal of the property. However, on last Saturday and Sunday I went back to review the property and see if there was

(Testimony of E. L. Newell.)

anything that I had overlooked and to see if I could see anything that might change my opinion as to the appraisal. I didn't find anything, so my appraisal stands.

Q. On that occasion in August, did you go all over all three of the tracts? A. Yes.

Q. And that was the time when the grain was headed out?

A. Yes, it was headed at that time.

Q. Now, Mr. Newell, directing your attention to Tract Number 77, the Alpine place, do you have an opinion as to the highest and best use to which that land could [178] have been put on March 4th, or within a reasonable time after that date?

A. Yes.

Q. And what is that opinion?

A. My opinion is that its best use was either for growing of grain or grasses, it could grow hay, I think it could grow alfalfa hay.

Q. For the growing of grain, grasses and hay?

A. Yes, it is dry land, it doesn't have water in connection with it and it would be dry farm.

Q. Do you know how many acres there are in that tract? A. Yes, there is 328.87 acres.

Q. Now, would you just step over to the map and tell the Court and Jury what you observed as to the layout generally, and how you valued the various parts of it?

A. I didn't break this ground down into so many tracts; this (indicating) is where the hotel building is and here is where the cafe building is, this

(Testimony of E. L. Newell.)

is the portion below the break in the bench, a little tract here close to the river, that, in my opinion, was some of the best soil in this Tract Number 77. I gave that a value—do you want me to give the value now?

Q. Yes, go right ahead.

A. I have given that a value of \$100 an acre. This little area, the buildings set on this, which consists of an [179] acre and a half, according to my map, and I gave that the same value. I did that for the reason that the building and things are on it. The rest of the area I didn't try to break down into classifications. I realized that there was some difference in the soil type in some parts of that, in some places there was a little more soil and a little less gravel and in other places it would be just vice versa. I gave the rest of that entire area a value of \$60 an acre.

Q. What is the general type of ground that you found on that tract?

A. The general type is what I call mountain loam soil mixed in some places with gravel. There are a few exposures of rock that would be large enough so that you wouldn't class it as gravel. I would like to go farther and say that one reason that I didn't want to break it into a lot of classes is that these little areas like these red spots, and this red along in here (indicating), this red indicates the break in the bluff between this lower tract and the upper tract, between the river and this (indicating), so I just gave the whole area a valua-

(Testimony of E. L. Newell.)

tion of \$60 an acre; some of it could possibly have had a higher valuation and some lower, and I didn't want to attempt to break out those little areas and classify them differently.

Q. That valuation included that which is marked in red? [180]

A. The \$60 valuation included this area which is marked in red and these little spots as well.

Q. Now, Mr. Newell, did you consider the possibility that ground might have for raising any crops other than the ones that you have mentioned?

A. Yes, I did. I considered the possibility of it raising other crops and I investigated as much as I could with the time that I had by observation and by asking questions from informed people in the area. I think it could and would be capable of raising other crops besides barley. There is an area, I think it is in this part, where there is a seeding of brome grass, and then I was over on Mr. Shurtleiff's property, too, in August. When I was there there was a fairly nice stand of brome grass, and I think that it would have been as valuable a crop, if not more valuable, than the barley crop on the place. I have also been told that in years past there has been alfalfa grown on a good portion of this area, and that it made a fair yield for dry ground.

Q. Did you consider the possibility of raising wheat on the land?

A. Yes, I considered that, in my observation of the area I seen very little wheat, but I did see

(Testimony of E. L. Newell.)

some; from what I could determine about the seasons in the area, I felt that barley would be a more profitable crop for the [181] reason that if you put in wheat you would get a little less yield, less bushels per acre, and you would run more risk of frost damage, and then another thing is in order to raise wheat you have to have an allotment with the Production and Marketing people, and since they limit the acreage that they allot so much, I doubt that one could get a very big allotment of wheat for that area if he hadn't been raising wheat before.

Q. You stated, I believe, that the production of wheat would be less than barley on the same ground?

A. That is common, yes; wheat doesn't produce as many bushels as barley per acre.

Q. Were you able to determine, when you were on that property in August, from looking at the crop, about what the estimated yield would be?

A. Yes; I went over that field pretty thoroughly that day and the yield was light, although it had the appearance of being fairly well filled out; my estimate at that time would be about fifteen bushels, approximately, per acre, that is taking the entire field.

Q. During your forty years of farming and ranching experience, have you had occasion to make estimates of your own grain in the field, and then check against the actual yield when you combined or threshed the fields out?

A. I have on my own and others, too. [182]

(Testimony of E. L. Newell.)

Q. Now, Mr. Newell, keeping in mind that the definition of fair market value is the amount of cash or its equivalent that a seller, willing to sell but not required to sell, would accept, and the amount that a buyer, willing to buy but not required to buy, would pay, and keeping in mind your opinion as to the highest and best use that you think that land could be put to on March 4, 1955, or within a reasonable time thereafter, do you have an opinion as to the fair market value of Tract 77, as of that date?

A. Yes; I do.

Q. That date being March 4, 1955?

A. Yes; I do.

Q. And what is that opinion?

A. Would that be with the buildings?

Q. Including everything?

A. With the buildings and everything on the place, my valuation of that was \$27,370.00.

Q. Now, in coming to that conclusion, did you consider or take into consideration, the status of that property where the buildings are located as a townsite?

A. Yes; I did.

Q. And how did you feel in regard to that, Mr. Newell?

A. I gave that considerable thought, and so far as I could determine there would be no special value to that land [183] in the foreseeable future as a townsite.

Q. Why did you come to that conclusion?

A. One of the principal reasons was that my

(Testimony of E. L. Newell.)

understanding is that the town has been there and the store buildings and such have been there for a great number of years, and there is no indication that there is any activity or any movement to expand, there isn't any new construction in there, I saw no reason, due to the fact that there are plenty of facilities along the highway and other places, so I saw no reason to speculate on the idea that there might be an expansion in that particular area.

Q. As I understand you, you classify that as dry farming ground? A. Yes, I did.

Q. Did you make any investigation as to the type of moisture, the amount that that vicinity had this past year, as to whether it was normal, below normal, or above normal?

A. I never went in to any records on that—so far as records are concerned I have heard more here since Court started than I had heard before, although I did check at the Bureau of Reclamation office and I got what information I could there and then I talked to farmers and other people in the area with regard to the moisture that they had had this year as compared to other years. [184]

Q. And what conclusion did you come to as to whether this past year has been subnormal, normal or above the normal of years?

A. Most of the people that I talked to seemed to think that it was a little above normal.

Mr. Holden: Just a moment. I object to what anyone thinks, Your Honor. It is hearsay and not

(Testimony of E. L. Newell.)

competent; he is just quoting someone as saying they thought.

The Court: You don't need to quote anyone, Mr. Newell; you can just give your answer as to what you determined from the investigation you made.

A. I determined that this was a good average year, if not above.

Q. So far as moisture was concerned?

A. So far as moisture and growing conditions were concerned.

Q. Now, did you make any separate valuation on the buildings on the townsite there?

A. Yes, I did.

Q. Do you have the figures which you gave as the valuation of those buildings?

A. Yes, the one that is called the hotel building, I understood was an old store building which had been remodeled into a hotel for the purpose of renting rooms. I measured [185] that building and the total measurement of the building was 1101 square feet; that would be the measurement as a floor measurement. I gave that building a value of \$5,505.00.

Q. Does that figure that you gave include the lean-to or the attachment on that part?

A. Yes, and also the well. In figuring the value of the building, my method is that if the building is being used for living purposes it must have running water for house use, and therefore, regardless of whether it is a well or spring, or where it may

(Testimony of E. L. Newell.)

come from, I reflect the value of the well or the water supply in with the building.

Q. And what about the other building?

A. The other building is what is called the cafe building; it had 468 square feet in that and I gave it a value of \$1404.00—in that case there was no well with the cafe building and so I added the value of the pipe that led from the well at the hotel over to the cafe building and that made a total value of \$1486.00 for the cafe building.

Q. Is there anything else that you took into consideration in valuing that tract?

A. Yes; there was another old log building that set off in the field. Mr. Ruud told me that he used that at times for storing grain, and I have given that a value of \$60. [186]

Q. Is that tract fenced?

A. No; there is some fence on the place, but there is no fence entirely around the place. No, I would say it is not fenced.

Q. What type of fence is there that you observed?

A. Barbed wire. I didn't give the fence any special value because for one reason the fence was not so that it would keep livestock off the place, and my method in figuring of land value, I do not give the fence any special value, but I reflect the value of the fence in the price that I give the land.

Q. Now, Mr. Newell, directing your attention to the home place down there, Tract 41——

(Testimony of E. L. Newell.)

The Court: —Before we start on that, I think we will take our noon adjournment. We will adjourn at this time until 1:30 o'clock.

November 9, 1955—1:30 o'Clock P.M.

The Court: You may proceed, Mr. Furey.

Q. Mr. Newell, to move on now to Tract Number 41, the home place, do you have an opinion as to the highest and best use that land could be put to on March 4, 1955, or within a reasonable time after that date? A. Yes, I do. [187]

Q. And what is that opinion?

A. The production of small grains, hay and pasture would be the principal and best use.

Q. Do you know how many acres there are in that tract? A. Yes.

Q. How many?

A. 671.12 acres; that included the highway, however.

Q. And do you know how many acres there are in the highway?

A. Yes, 16 acres, maybe something over, about 16½ acres.

Q. And that would be how many acres of farming ground that Mr. Ruud has in that tract?

A. Well, now let's see—that would be about 655 acres.

Q. About 655? A. Yes.

Q. Now, Mr. Newell, would you tell the Court and Jury, and if you would like to, you may step

(Testimony of E. L. Newell.)

over to the map to help out on that. Just tell the Court and Jury what you observed about this tract as to its characteristics, the topography, and so forth.

The Court: There is one thing, and I am sure you attorneys can answer this, is the land taken for highway purposes included in this condemnation?

Mr. Furey: As I understand it, and, Mr. Holden, you correct me if I am wrong on this, as I understand it the land is being taken, the land [188] is state highway land, however.

The Court: And it would have nothing to do with this suit?

Mr. Furey: The land is being taken in this suit, yes.

The Court: I didn't know whether everybody understood it or not, but as I understand it now the land embraced in the highway is a part of this?

Mr. Furey: That is being taken, yes; it is included.

A. This is the place in question, and this white line through here indicates the highway which consists of sixteen and some fraction acres. This two acre tract (indicating) had been used for school grounds and for school buildings, and it will be separately valued; there will be a separate value placed on this two acres. I put no value on this roadway, this highway right-of-way. The rest of this farm I broke into, I think it is four different parts. I tried not to break it into too many parts because it is hard to determine where the breaking point is

(Testimony of E. L. Newell.)

between one classification and the other classification. This portion on the east side of the highway, with the exception of this little piece of grazing ground here, which is 1 and some odd acres, I gave that all in one classification, and along with that, I gave the same [189] classification to some of this ground on the extreme south end of the place. Now, this portion (indicating) is the gravelly bar in here; it has been described before as a gravelly bar, I believe. I didn't exclude that or give that a separate value for the reason that I didn't think there was as much of the gravelly bar as is indicated on the red portion. I didn't know exactly where to divide that and so I just took a general average of this ground and this ground down here, just what it would be worth per acre. I based that on what I thought the production of this type of ground would be. This piece of ground down here had no indication of having been irrigated recently.

Q. Were there any ditches leading to that ground?

A. Nothing in evidence that I could see, but to the best of my recollection Mr. Ruud was with us and he said that there had been some ditches there but due to the fact that he had been planting it straight to barley that they had been filled up. However, there was a portion of that that never had been covered by ditches.

Q. And which portion was that?

A. That would be the extreme north portion. I gave that a value—there was 297.30 acres, and that

(Testimony of E. L. Newell.)

I gave a value of \$140 per acre. This ground, in my opinion, would be the least adaptable to irrigation, in other words, it [190] was short of water in certain seasons and the practical place to put water would be through this central part of the farm; it is the best ground, it is the levellest and the most susceptible to irrigation from every respect, and that was where he was using the bulk of the water as of that time.

Q. Now, what type of crop was grown on that ground that you have pointed out, this summer when you were up there?

A. It was barley on all of this portion, and also it was barley on most of this that is indicated in red. At one time this was marked to sagebrush and rock, but that had been plowed up and, for the most part, was growing barley.

Q. And what do you have to say as to the type of crop that it was, about what it would have run in bushels per acre?

A. In this particular part it would probably have run about twenty bushels to the acre.

Q. Twenty bushels to the acre, you say?

A. Yes, twenty bushels to the acre on this part down here. However, my opinion of the average of the whole, the entire place, would have been about forty bushels.

Q. To the acre? A. Yes.

Q. And that is the average including all of that crop land?

(Testimony of E. L. Newell.)

A. Yes, including everything. For this better part of the ground which consists of 246½ acres, I gave \$200 per [191] acre. This portion in here is the part that is mainly under the bench, and along the river, and it consists of 106.86 acres. However, that figure includes some of this other, these other little places marked as pasture land and wasn't being farmed. They were included in that. This portion here was the better part of the 106-acre tract. It was, at the present time, growing a good stand of grass, that is native grasses I would call them, with some clover, blue grass, and probably some timothy. It was a real good stand of good grass feed. There was plenty of water for this area in here from several springs coming out under the bench. This narrow part is more or less of a trailway from this portion on to the north portion. This part up here is not quite so good as this; it has a thin growth of sagebrush and it has a fair growth of grasses. It receives some water, some of the waste water from the higher ground and it is producing a pretty fair growth of grasses. I considered that this area—I considered Mr. Ruud was using this area to the very best advantage that he could use it for, and that was for several reasons—I will admit that there is some ground there that would grow other crops, but the reason that I think he is using it to the best advantage is that in cattle grazing, and in cattle pasture, the best practice is to [192] have some ground that grows a prolific growth of grass and green feed and some ground that is more dry

(Testimony of E. L. Newell.)

and has a dryer feed and also there is good water here; the water runs winter and summer. If he cared to carry his stock through the winter he has a nice place here that would make a good feed ground, and also his hospital barn and some of the other facilities he has located down in that area. I feel that Mr. Ruud is making the very best use of this particular 106 acres of ground possible, and while some of it is just as valuable ground as this higher land, there would be more of it not so valuable, and so I gave that an average value for the 106 acre tract of \$175 an acre.

Q. Before you go on, Mr. Newell, with respect to the pasture down there, what in your opinion would be the result if Mr. Ruud was to plow up some of that which could be plowed up and planted to crops, what would be the result so far as making the best use of the 106-acre tract is concerned.

A. Well, he would be able to raise a good crop on a portion of it.

Q. About how much?

A. It would be not over forty acres in this area, which is the best ground and the best irrigated, and he would lose, to a certain extent, the value of the feed that would be on the break and the slope there and places where it is [193] a little swampy and then other places where it is covered with brush and trees. I forgot to mention about those trees. Some people may discount that ground for the reason that it had some brush and trees, but in my mind the brush and trees were not a detriment to the ground

(Testimony of E. L. Newell.)

for the purpose that he was using it for and, in fact, it would be a benefit to the ground. I think there is plenty of water to irrigate this area in here if he ever cared to irrigate it.

Q. Why would those trees and that brush be an advantage to the ground in using it for pasture?

A. It would be shade in the summer when the cattle wanted to get away from the flies and out of the hot sun and it would be a protection in the winter time when they wanted to get out of the wind, the storm and the cold, and it would also be a good feed ground.

Q. Now, excuse me for interrupting, you go right ahead.

A. This little portion consists of an acre and something, this portion and this piece here together, that is this plus this (indicating) was 9.3 acres, and that has a growth of native grass up on the hillslope above what would be practical to farm. That has a growth of native grass which has some value for stock feed, and I gave that portion a value of \$25 per acre. Would you like to know the things that I took into consideration in [194] placing the different values on these properties?

Q. Yes, go ahead.

A. I took into consideration, of course, the type of soil, the different soil types, and I took into consideration the extent of irrigation that I thought he would be able to use effectively on this place. I took into consideration the home and all the surroundings in connection with it as a good farm and a good

(Testimony of E. L. Newell.)

home. I took into consideration the fact that there was a good highway through here leading to market points, to places where there are good schools and churches and places of recreation and amusement. I also took into consideration the distances which he would have to go to grade school and high schools, and the distances from market. I took into consideration everything that Mr. Ruud had told me that was advantageous to the place, and I balanced that against the information that I got from informed people in the area. I took into consideration what it might take him to move out into a different area and make himself whole so far as having an operation is concerned, together with my general knowledge of farming and crop raising and stockraising and land values in the State of Idaho, and I placed my valuation on the property based on those facts.

Q. Mr. Newell, you mentioned the home. Did you put a separate [195] value on Mr. and Mrs. Ruud's home?

A. Yes, sir.

Q. Will you tell us what that was, the separate valuation that you put on the home, and will you explain what went into that valuation—just explain what went into your conclusion in arriving at that valuation?

A. The valuation that I placed on the dwelling house was \$17,280.00.

Q. And how did you arrive at that?

A. The things that I took into consideration in that was the fact that it is a very modern home, it isn't a new home but it isn't a real old home either.

(Testimony of E. L. Newell.)

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(Testimony of E. L. Newell.)

It is modern in every respect. It has good running water in the house, it has a furnace and stoker for heat, plus a good fireplace. The house in every way is modern, and so I figured that on a square footage basis, including the water and all of the facilities that the house has.

Q. And how much did that figure per square foot?

A. That was figured at \$12.00 per square foot. That type of house with a basement and rooms upstairs, if you were to build it now, would cost about \$15.00 a square foot, but due to the fact that it wasn't entirely new I reduced it to \$12.00 a square foot.

Q. And what about the other improvements, Mr. Newell?

A. There was a garage there, eighteen by twenty feet, and [196] I figured that at \$2.00 a square foot; that I valued at \$720. The garage is practically in the same situation as the house; it is a good garage, in good shape, and it is 15 to 20 years old, about that old I would say. It has a concrete floor, shingle roof and the condition is good.

Q. Will you just go ahead with the rest of the improvements, Mr. Newell?

A. Then I have a barn, a horse barn 12 by 14 by 16 feet high; its apparent age is 15 years; it is a frame construction with a metal roof and a concrete floor and its condition is good. I figured that at \$2.00 a square foot and that figures out at \$336.00.

(Testimony of E. L. Newell.)

There is a hog barn 12 by 12 and its apparent age is 30 years. That is of lumber construction with board roof and no foundation and its condition is poor. I value that at \$50; that was not by the square foot measurement because its condition didn't justify figuring it on a square footage basis. There was a hog shed five by ten by four and a half feet high, and its apparent age was 50 years. I have given that no value at all; that was a log construction with a slab roof and no foundation, and its condition was poor. He had a granary, 18 by 31 by 12 feet high, and that figured at 558 square feet, and at \$2 a square foot that equaled \$1,116.00. Its apparent age was 15 years and the construction was two by fours laid flat with a double rough [197] board floor and a metal roof, a concrete foundation and there was a lean-to shed on each side of the granary used for machine sheds. They were each 18 by 31 feet, and each shed equaled 558 square feet or 1,116 square feet at \$1 per foot. This didn't have any floor, neither of them had floors, they were just sheds and these two sheds equaled \$1,116.00 together in valuation, making the two sheds and the granary combined at \$2,232 for the unit. He had a barn for cattle and hogs, 49 by 29 by 12 feet high; it was 1,421 square feet, and I figured that at \$1.50 a square foot, giving that barn a value of \$2,131. He had a shop that he used for a blacksmith shop and general repair purposes; that was 12 by 25 feet, and that would be 300 square feet, and its apparent age was 40 years; it was of lumber construction with lumber roof and no foundation

(Testimony of E. L. Newell.)

and no floor. The condition was not too good and I gave that shop a value of \$150. There was a chicken coop, 25 by 16, being 400 square feet. Its apparent age was about 40 years. It was of log construction with metal roof and dirt floor. I gave that \$200 valuation. There was a brooder house, five by twelve, which was sixty square feet, and that was of the apparent age of fifteen years; it was board and bat construction with a shingle roof [198] and board floor, placed rock foundation; the condition was good, it was wired for heating and lighting, and I valued that at \$60; it was sixty square feet. There was a woodshed 12 by 14, which equals 168 square feet. I gave that a valuation of fifty cents a square foot. It was a shed without a floor and not in too good a condition, it was just frame construction, and its apparent age was forty years and it was valued at \$84. There was a tenant house 23 by 14, and its apparent age was forty years, it was a frame construction with metal roof and placed rock foundation. The condition was fair and livable, and I gave that a valuation of \$1,288, on the basis of \$4 a square foot. That type of construction would cost \$8 a square foot if it was new, but due to the age I reduced it. There was a hospital barn that was 40 by 14 feet, that would be 560 square feet, at \$2.00 a square foot, \$1,120. Its apparent age was twenty years, it was a frame construction with a metal roof on a cement foundation and the condition was fair. There was a milkhouse, 10 by 12, 120 square feet, I figured that at \$3 a square foot and it amounted to \$360. The ap-

(Testimony of E. L. Newell.)

parent age of that was 20 years, it was concrete construction throughout with the exception of a shingle roof, and it was in good condition, but was locked and I was with Mr. Ruud. However, he didn't [199] have the key and I didn't see the inside of that, but I took it to be a good building. That is the extent of the improvements that I attached value to.

Q. Did you put any separate value on the metal granaries?

A. Yes, I did, this that I have given was value that I made at the time that I made the appraisal but the value of the metal granaries I placed on since I came up this time because I was instructed that they were to be put in. There were 20 of those granaries and I gave them a value of \$400 each or \$8,000.

Q. How about the fence around the buildings? Did you place a value on them, and if so, how?

A. I didn't place any value on any of the fences, or on the corrals for the same reason that I mentioned on the other place, I always reflect the value of fences and things of that type in with the land because they are a necessary thing to have on the land to make a reasonable and profitable operation and they are hard to break down because of the conditions that you would find here and there, and I just reflect them in the value of the land.

Q. Do you know what the situation is in regard to utilities, telephone and so forth?

A. Yes, the place is served with electricity from an R.E.A. system that serves the area. I hope that I

(Testimony of E. L. Newell.)

am not [200] mistaken, but my notes show that Mr. Ruud doesn't have a telephone in the house, some have said here that he does have and I may be wrong on that.

Q. Did you consider the possibility of raising wheat or seed potatoes or any other crops on this tract 41B?

A. Yes, I did, I considered the possibility of raising other types of crops that I thought would be suitable in an area of that growing season, and with the elevation that they have there. I discounted most of the ideas that I had thought of for the reason that it appeared to me that Mr. Ruud is a shrewd operator. He has lived in the area a good many years and I think that he knows his business. I think that he is using the place to his very best interest and I felt the same way. There are various reasons that you might not want to grow other crops that I think you could grow there, if you care for me to mention some of those I will go ahead.

Q. Yes, go ahead.

A. The question of wheat, the same reasons would apply that I mentioned on the other place, unless he had a wheat allotment he couldn't raise over fifteen acres of wheat, they are limited to fifteen acres, and it is pretty hard to establish a wheat allotment where you have not been [201] growing it. In fact, I doubt that you could establish one. The next reason is that the wheat in an area of that elevation and with that growing season would be more hazardous, although I am certain that there would

(Testimony of E. L. Newell.)

be seasons when you could grow it, but the evidence is in the area that people are not going for wheat, there is very little grown there. Your production in bushels would be less and the net income would not be any better than it is in barley. I considered growing spuds and it is my opinion that the soil there would grow spuds, but I think again it would be hazardous from the standpoint of frost, I think that some years they would have damaging frost in the early season or the late season, and the net income from that would not be good, taking it as a whole. This is quite a large operation and the general practice for raising spuds is not to go in "whole hog" for spuds. Ordinarily on a large place, if a person wants to risk spuds, they will put in maybe forty acres, more or less, but that would not be indicative of the things that he would want to raise as a whole on that place. Basing by values on the use of the place. I felt that Mr. Ruud was using his place properly and to the best advantage, and so that I felt it was the proper way to place my valuation on my judgment. [202]

Q. Did you consider the possibility of rotating grain crops with grass crops?

A. Yes, I did, and that is a very feasible thing to do. However, in the process of converting over from a grain crop to a grass crop you would, to a certain extent, lose about a year in the changeover, and you wouldn't want to change too fast because the year you changed back to grass from grain the growth that you could get on the grass that year would not

(Testimony of E. L. Newell.)

anymore than compensate you for the cost of the work in putting it in, so that in terms of money, it would not bring in enough but what you would practically lose one year in the changeover. That would not be true when you changed back to grain, and it does the ground good to put it in a grass crop and then change back to grain, it would improve the first year or two of a grain crop after the change.

Q. Now, Mr. Newell, keeping in mind the definition of fair market value that I gave you a moment ago in connection with Tract Number 77, do you have an opinion as to the fair market value of Tract Number 41, on March 4, 1955? A. Yes, I do.

Q. And what is that opinion?

A. Would that be without the little two-acre tract?

Q. Yes, exclude that two-acre tract, that is separate. [203]

A. That would be \$143,749.00. That includes the granaries but does not include the two-acre tract.

Q. Now, referring you to the two-acre tract, that is tract Number 34, and keeping in mind the same definition as to fair market value that I gave you, do you have an opinion as to the fair market value of the tract as of March 4, 1955? A. Yes.

Q. And what is that opinion?

A. It is \$140 an acre, that would be \$280.

Q. Is there any difference between the ground in that two-acre tract and the ground surrounding it?

A. No, there isn't any difference in that and in the ground immediately surrounding it.

(Testimony of E. L. Newell.)

Q. And you valued that separately because you were instructed to do it that way?

A. Yes, I was instructed, it had been used for a school lot and there was some question about who would be paid for it.

Q. And what is your total valuation figure, that is, what is the figure that you feel is the fair market value of the Ruud Ranch, including all three tracts?

A. The figures, the way they come out is \$171,399.00, so I will give him the extra dollar and my figure of the valuation is \$171,400.00. [204]

Mr. Furey: You may examine.

Cross-Examination

By Mr. Holden:

Q. Mr. Newell, I think you stated that it would not be feasible and not good farming practice to try to crop the entire ranch in potatoes, seed potatoes?

A. Yes, I did say that.

Q. But you did say, I think I understood you to say, that it would be practical to raise forty acres or so and work it in with the farming practices on that ranch?

A. Yes, if he so desired, I think it would be all right to risk trying that.

Q. And that would fit in to a well diversified type of operation, to have a limited number of acres of potatoes?

A. There is no reason that I can see, except for this, Mr. Holden, in this area I saw no facilities, no

(Testimony of E. L. Newell.)

potato cellars or any type of storage for potatoes and the nearest market, the nearest railroad market that I know of would be down at Ririe, and I think if you were going into a potato growing program up there for seed potatoes, I think you would need some storage either on the ranch or somewhere else, which would constitute quite a little expense and I think that you would have a risky crop, I think if you are a large enough operator so that you can take a loss if it comes then it would be all right, [205] you may profit by that type of an operation.

Q. Is the only risk in farming with seed potatoes, from your experience?

A. Oh, no, there are a good many risks in farming.

Q. There are other risks, with other crops?

A. Yes.

Q. And would you say that it would not be advisable in your opinion and that this ground would not be suited for the raising of seed potatoes?

A. No, I didn't say that, I said that I thought it would grow potatoes, but I do think it would be a risky deal. However, if a man wanted to take that risk I think he could grow potatoes.

Q. Do you know whether or not any seed potatoes are raised in that area, do you know of your own knowledge?

A. No, I don't know of my own knowledge. I didn't see in my travels through the area, I didn't see any fields of potatoes that would indicate that

(Testimony of E. L. Newell.)

they were raising potatoes in that area, that is raising spuds for the market.

Q. You are not familiar with the potato industry in this part of southeastern Idaho, are you?

A. I am quite familiar with the potato industry in the Snake River Valley.

Q. In the upper Snake River Valley? [206]

A. Well, I haven't had actual experience up this high, but I have had actual association with people who have definitely taken an interest in the production of spuds and all kinds of crops in this area.

Q. I am speaking of the upper Snake River Valley.

A. I haven't personally, no.

Q. Mr. Newell, you have had considerable experience as an appraiser for the Government on various projects, haven't you?

A. Yes.

Q. And you have testified in a number of condemnation suits through the years in connection with those projects, haven't you?

A. Occasionally I am called in a suit, yes.

Q. Will you tell the Jury in what areas your experience as an appraiser has been confined to, generally speaking?

A. I have appraised in Owyhee County.

Q. Will you just tell us where that would be?

A. That would be near Bruneau.

Q. And where is Bruneau?

A. That is on the Snake River almost directly west from Mountain Home, Mountain Home is forty miles this side of Boise, and this C. J. Strike project, which was built by the Idaho Power Company, is on

(Testimony of E. L. Newell.)

the Snake River, and I appraised a lot of land in that area. [207]

Q. And your appraisals were for the Idaho Power Company on that project?

A. Yes, for the Idaho Power Company in that instance, and I appraised land on the Anderson Ranch Dam project which is approximately forty miles east and south of Mountain Home.

Q. How far from Mountain Home?

A. Forty miles, that is to the dam site and then the area ran back fifteen miles, approximately. I also appraised land under the Cascade project, which is in Long Valley, Idaho. That has an elevation of 4,828 feet; that was the highest water level for the reservoir, and that is the best gauge I can go by for elevation.

Q. Where is that with reference to Pocatello, we have a Long Valley in this area, and I was asking for that reason?

A. No, I don't know the exact number of miles, but it would be in a northeasterly direction from Boise, Idaho, or in a northerly direction.

Q. And I believe that you stated that you appraised for the Army Engineers?

A. Yes, on the Lucky Peak Dam and that is directly above Boise on the Boise River. I appraised several tracts, large tracts of land for the Army Engineers.

Q. When did your experience as an appraiser commence, when did you start specializing in [208] that?

A. As an appraiser it began in 1940.

(Testimony of E. L. Newell.)

Q. And you have been appraising from that time on a good deal for the Government or for various Government agencies?

A. On an off and on basis, yes, whenever the occasion arose, and I also appraised other lands, I appraised lands for the Justice Department near Carey, Idaho. It would be about 25 or 30 miles from Carey on the Laidlow Park area.

Q. How long ago was that?

A. I am not definite on the date. I believe it was two years ago, I think it was in 1953. There were 1,200 acres of land in there with 600 acres of dry farm land.

Q. And you have also had experience in making appraisals for farm loan purposes?

A. Well, I have had experience in evaluating land for that purpose. I haven't gone out and made but very few definite appraisals. In the Production Credit Association, of which I am President, and I am also on the Executive Board, we do evaluate land for the loaning of money, we do that at times.

Q. And that organization is primarily engaged in the business of loaning money, isn't it?

A. Primarily for production purposes and not for the purchase of land.

Q. But it is a money lending institution? [209]

A. Yes, that's right.

Q. Prior to your first visit to the Ruud ranch in March of 1955, had you ever had occasion to visit that ranch?

A. No, that was my first visit to that ranch, and

(Testimony of E. L. Newell.)

my reason for visiting that ranch on March the 30th was not because I had any idea that I could make a good appraisal of the place at that time, but I wanted to start my appraisal by knowing what the condition in that area would be at that time of the year. Later going back and viewing the property to see about when they began planting their crops and when they began grazing the ground. Going back later to see the crops when they were pretty well toward maturity, that was my idea in going in March, but not because I thought that I could go over the ground or thought that it would be appraisable at that time.

Q. I wasn't inferring, Mr. Newell, and I don't want the Jury to conclude that I thought that you thought you could do it in March, or on March the 30th, or whatever the date was, I was merely trying to find out whether or not that was your first experience in that area, in appraising land.

A. In that immediate area it was, yes, sir.

Q. And you went expressly for the purpose of appraising this [210] and another property; I believe that you stated that? A. Yes, I did.

Q. And you have had no experience in appraising land in the Idaho Falls area or in that part of the state, have you?

A. No, I never appraised any land in that area.

Q. And your experience has been confined largely to other parts of the State of Idaho, over in the Boise area and that section?

A. Well, my experience has been pretty well

(Testimony of E. L. Newell.)

spread over the State of Idaho. I think when you take all of the factors into consideration, elevation, seasons, soil types, then I think that there isn't any particular difference in value that you would place on ground in Grand Valley and what you would place on ground in another area, that is similar types of land in similar elevations with similar seasons.

Q. What you are trying to convey is that you are a competent, qualified appraiser there?

A. I think I am, yes.

Q. Do you think that the primary factor is the elevation factor?

A. Oh, there are a lot of factors.

Q. There are a lot of factors to take into consideration in addition to the elevation? [211]

A. Yes, that's right.

Q. And you take those into consideration?

A. Yes, sir.

Q. Who accompanied you on the first trip to the Ruud ranch on July 30th, 1955?

A. You say on my first trip to the ranch?

Q. Yes. A. That was on March 30th.

Q. Pardon me.

A. I went to Swan Valley in my own car, I had my wife with me and we stopped at the little hotel or stopping place there and a man by the name of Transue, working for the Reclamation Service at that time, took a jeep and drove me over the area. He drove me over as much as he could of it and we took the jeep for the reason that the roads were not

(Testimony of E. L. Newell.)

too good, they were sloppy and slick. He knew the area and so we went up and down the highways——

Q. ——He was the land acquisition man for the Bureau of Reclamation? A. Yes.

Q. And he made you acquainted with the Bureau appraisers?

A. No, he didn't, not at that time.

Q. Did someone at a later date make you acquainted with them?

A. The only one I could say was at a later date and that was [212] Mr. Sayer—I met him at a later date in the Bureau office. That was on May the 22nd.

Q. Did Mr. Transue make available to you the appraisal report from the other appraisers? I think you said you considered them.

A. No, Mr. Transue didn't, but I had heard that there had been another appraisal and I had seen a part of the result.

Q. You had seen and inspected the other appraisal reports. Now, did any other appraisers accompany you at any time subsequent to March the 30th, 1955, on your visits to the Ruud property?

A. Yes, on May the 20th, 21st and 22nd, I was with Jerry Carruthers.

Q. And who is Mr. Carruthers?

A. He is an appraiser that was employed by Mr. Furey.

Q. Mr. Carruthers went over the property with you on the occasion of the May visit to the property? A. That's right.

(Testimony of E. L. Newell.)

Q. Did he accompany you to the Ruud property on the next visit to the property?

A. That was in August?

Q. Yes.

A. No, I was with Mr. Furey at that time.

Q. So far as you know, Mr. Carruthers was here just once? [213]

A. I am not positive whether he came again or not, but at the time I was with him he told me that his intention was to come back, but I don't know for sure whether he did come back.

Mr. Furey: To shorten this up I might state that Mr. Carruthers will testify next, and he will tell you when he was there and how many times.

The Court: I notice he is in the courtroom.

Q. With reference to the Alpine ranch, you appraised that all in one piece as I recall?

A. No, that little piece below the bench, of something over twelve acres and an acre and a half in the townsite were separate. The balance was in one blanket coverage.

Q. Do you know whether there are wheat allotments in that area? A. You say in the area?

Q. Yes. A. I understood that there were.

Q. There are wheat allotments in the Alpine area?

A. Well, I have heard that there were.

Q. And you took that into consideration in making your appraisal?

A. At the time I actually made the appraisal I didn't have [214] any definite information as to

(Testimony of E. L. Newell.)

whether there were any wheat allotments in the Grand Valley or not.

Q. When you were in the area of the Alpine ranch, did you check to determine whether alfalfa was a type of crop grown in that area?

A. Yes, I did.

Q. And do they raise alfalfa in that area?

A. I have seen alfalfa, yes, I saw some alfalfa there.

Q. In arriving at the valuation on the property in the Alpine area, how did you decide with reference to whether that farm could be cropped each year on a crop rotation type of operation?

A. At the time, of course, I talked to Mr. Ruud and I talked to some other people, and, of course, I know the general result of farming ground continuously to one grain crop, I know that of my knowledge, and it results the same on whatever ground you use.

Q. In any part of the country that is true?

A. Yes.

Q. I am speaking now with reference to crop rotation, not continuing to raise the one particular crop, but a diversified farming.

A. You are talking about converting from grain to grass crops?

Q. From alfalfa to grain? [215]

A. Yes; that could be done.

Q. It could be done? A. Yes.

Q. So they could raise a crop each year?

A. For each year that you planted alfalfa, of

(Testimony of E. L. Newell.)

course, you wouldn't get much of a return on the first year.

Q. I don't know how you do over in your part of the country, Mr. Newell; how do you consider raising alfalfa; don't you raise grain as a nurse crop?

A. On irrigated ground they do to quite an extent, it is not a hundred per cent successful, but it is practiced, but that is not done on dry ground.

Q. You never saw that done successfully on land similar to the land in the Ruud property in the Alpine district where they have the precipitation annually that they have in that area?

A. I never have seen them make a success of getting an alfalfa stand grown with grain as a nurse crop on dry land.

Q. Have you ever had any experience with land situated like that, that is, with reference to the precipitation and the type of soil?

A. The Long Valley area is very similar in a lot of respects.

Q. On the Alpine ranch, can you tell me whether or not there are any springs there; did you determine whether there were?

A. I did in this way, I was with Mr. Ruud. We stood at a [216] point where he could point out the location of the spring. I never went to the spring, but I took it into consideration for the reason that Mr. Ruud told me it was there and I had no reason to doubt that it was, and, of course, I took that into consideration.

(Testimony of E. L. Newell.)

Q. You are not familiar over a period of years as to the traffic condition in that area?

A. No; I have no record that would give me such information.

Q. And you would not have any background or information which would aid you in determining whether there was land there that would be best suited for townsite purposes?

A. Well, in a general way I do.

Q. But you don't have any background or actual experience that would help you in making that determination, do you?

A. Well, I have had experience in watching locations such as that in road junction areas, and in likely places, but not in that particular place, I have no records that show the traffic that goes there, nothing that would show the travel that goes over that road.

Q. And, of course, the important factor would be the amount of traffic and type of road junction involved?

A. Well, there would be other things, too; that is as to what other facilities would be available and what other spots just as likely, where those likely spots would be.

Q. What valuation did you place on the land marked in yellow, [217] which you have identified as townsite?

A. Well, the acre and a half, that little block of an acre and a half I identified as townsite. I gave

(Testimony of E. L. Newell.)

that the same value as the land under the cliff there. I gave that \$100 an acre.

Q. Do you know whether there is a post office in the townsite? A. I am not positive.

Q. You are not sure of that? A. No.

Q. Well, Mr. Newell, do you know with respect to the portion of the town on the Wyoming side, whether or not, or did you take into consideration whether or not there would be an increased demand for a townsite area by reason of the fact that Idaho does not have a sales tax, and the fact that they have one in Wyoming?

A. I never definitely considered that factor, but I saw nothing that indicated that there would be a movement to make a town there.

Q. And you were at that ranch how many times?

A. The same number of times that I was at the other. I visited both places on each occasion.

Q. Now, with reference to the home ranch, I believe that you placed the valuation of \$140 an acre on the land that is on the east of the highway, and the portion of [218] the land in the southern part?

A. Yes.

Q. Do you know whether there is a decreed water right for the land on the east side of the road-way and for the land down at the southern portion of the Ruud ranch below this area in red?

A. It was my opinion and information that Mr. Ruud had a decreed right in Indian Creek and it was also my impression that he could use it anywhere on that ranch that he preferred, wherever

(Testimony of E. L. Newell.)

he thought would be the most profitable and likely spot, and provided that he had the ditches to carry it there.

Q. Just like any ranch would have to have their own ditches for the water?

A. So long as the water lasted and was in the stream, if it held up so that he had the water he could use it. I wonder if I might continue on that a little?

Q. Yes; you surely may.

A. In order to make it clear as to what I considered on the water matter, my information was gotten principally from conversation with Mr. Ruud and, to some extent, talking with Mr. Transue and Mr. Ackerman at the dam and with one or two other farmers in the vicinity. My information was that Indian Creek has quite a large flow, the same as any other stream, early in the season. I mean by that [219] any other mountain stream, and it was my understanding that Mr. Ruud had better than 700 inches of decreed water for his farm. This would be ample water so long as the flow held up, but it was my understanding that later in the season the flow of water dropped to such proportions that there would not be sufficient water for all of the place, and that it could then be better used on the central part of the place where it was better land, and it was quite questionable in my mind as to whether it would be profitable to make the necessary ditches and do the necessary work that it would take to place water on the extreme north

(Testimony of E. L. Newell.)

portion of the place for the reason that there would not be sufficient water for the entire place.

Q. Did you check any records on that, Mr. Newell?

A. No, I didn't; the only records I heard was what was brought out here in Court, and, of course, all the information I had was from mouth to mouth.

Q. You didn't make any independent investigation to find out what the water condition was there when you arrived at your appraisal of the land?

A. Yes, I did. I was with Mr. Ruud and he showed me the ditches and the entire situation there.

Q. You didn't check independently of that to determine whether there was adequate water for the irrigation of this ranch?

Mr. Furey: Now, I want to object [220] to this question on the ground that Mr. Holden has made a suggestion here that is just the opposite to what this witness' testimony is, and he has twice made that suggestion after Mr. Newell has testified what he did, and I object to it as improper cross-examination.

The Court: I think the jury will notice all of those thing, Mr. Furey. I have a great deal of confidence in this jury. Just go ahead.

A. I have kind of forgotten just what the question was.

Q. You didn't make any independent investigation to determine the availability and the nature of the water; that is the nature of the water right

(Testimony of E. L. Newell.)

of the waters that had been used in connection with the farming of the Ruud home ranch?

A. Not from records, but principally my information was from what Mr. Ruud said and I based my judgment on that information and information I got from other men in the area.

Q. Did you check with any of the other neighbors to determine how they handled the water from Indian Creek in the irrigation of their land?

A. No; not any of the fellows that irrigated in the same ditch with Mr. Ruud.

Q. You didn't check with any of them?

A. No; I didn't.

Q. In arriving at the valuation of this area on the Ruud ranch lying east of the highway, did you take into [221] consideration whether this ground could be cropped each year, the ground in that area, whether it could be cropped each year on a good diversified type of farming program?

A. I see no reason why it could not be cropped if you were diversifying between hay and grain crops. Of course, you would have some loss during one year.

Q. From your experience in your area, you are familiar with raising of hay and grain?

A. Yes.

Mr. Holden: I think that's all.

(Testimony of E. L. Newell.)

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Redirect Examination

By Mr. Furey:

Q. Mr. Newell, you were asked whether you had talked with other appraisers and looked at other appraisals of property in this area; that is, talked with appraisers from the Reclamation Bureau?

A. Yes.

Q. But is your testimony which you have given here and the appraisal, is it your own independent appraisal, arrived at independently and is it your own conclusion?

A. One hundred per cent, yes.

Q. Did you make any inquiry with regard to the townsite up there at Alpine, as to how long the post office and the other buildings had been there?

A. Yes; I talked to some people. I talked some with Mr. [222] Ruud and some with a man by the name of Ford, who lives right there at the townsite of Alpine.

Q. And they gave you the history of that?

A. Yes, and I talked with a man that leased the hotel building and one place across the street.

Q. Those people were living there at the time?

A. Yes.

Q. And did they give you a history of the townsite with respect to the buildings?

A. Mr. Ford did more particularly.

Q. And did they tell you how long it had been since a new building had been built there?

(Testimony of E. L. Newell.)

A. I don't recall that I asked him that particular question as to just when the last building was.

Q. Did you see any evidence there of new construction or new buildings? A. No.

Q. And how did the buildings appear so far as age was concerned?

A. Well, they were quite old; they were buildings that were approximately forty years old, in my opinion.

Q. There were no buildings there that appeared to have been built recently?

A. That's right.

Q. In considering the value that you put on the property [223] east of the highway on Tract 41B, did you take into consideration whether or not Mr. Ruud would have put water on that part east of the highway if it was available?

A. I don't quite understand your question, Mr. Furey.

Q. In considering the value and the classification that you put on the property, I mean the property east of the highway, the property you classified as dry land, did you consider whether or not Mr. Ruud would have had water on that and irrigated it if the water had been available?

A. Yes. From all the evidence the practical place to use the water was on the other side of the road on the better part of the ground there, although I gave some extra value to the land due to the fact that there was a possibility that some water could be put on the east side.

(Testimony of E. L. Newell.)

Q. Now, referring you to that same ground is it your—that is, do you have an opinion with regard to whether or not cropping that with different crops, rotating it, would be putting that ground to its best and highest use?

A. I think it would.

Q. You think it would? A. Yes.

Q. And did you value it from that point of view, with that [224] possibility in mind?

A. Yes, sir.

Q. Did Mr. Ruud tell you what he had been doing with that ground in prior years?

A. Yes; he told me that years ago he had a good portion of the land in grass and pasture and that he had pastured steers on a good portion of it.

Q. What did he tell you with regard to that, that is, as to what he had been doing with that ground the last few years, five or six years?

A. Yes; cropping it to barley.

Q. Every year? A. Yes.

Q. And he hasn't rotated it in crops, that is, he hasn't rotated the crops on that ground in recent years? A. Not in recent years, no.

Mr. Furey: That is all.

(Testimony of E. L. Newell.)

Recross-Examination

By Mr. Holden:

Q. In your conversations with Mr. Ruud in reference to the method of cropping this ranch, did he not tell you that because of the uncertainty of time in which he would be permitted to keep this ranch because of the Government coming in and taking the property, that he was obliged to raise grain longer than he ordinarily would? [225]

A. Yes; he told me that was the reason for cropping it continuously with grain.

Q. That he didn't know from one year to the other when he would have to get off because of the dam?

A. Yes; he told me that and I considered it.

Q. Now, do you know how long it has been since the dam was first started, the construction of the dam proper?

A. Not definitely, but it is my understanding that it has been several years.

Q. Now, do you know when the project was first authorized by Congress?

A. Again I don't know definitely, but I know it has been a long time.

Q. Do you know whether or not since the authorization of the Palisade Project there has been any commercial development in the area of Alpine, not at the junction of the highway, but within an area of a mile or a mile and a half removed from the

(Testimony of E. L. Newell.)

townsite, and in an area where there would be no flooding from the reservoir?

A. I am not posted on that.

Q. Did you visit in other areas there within a mile or a mile and a half of the present townsite?

A. Yes; I went all over that country, both ways from the dam.

Q. Did you go up to the Flying Saddle [226] ranch? A. Yes.

Q. And did you find out when that was built?

A. I presume I did at the time but it didn't impress me, so I couldn't tell.

Q. There is considerable development in the area of the Flying Saddle? A. Yes.

Q. And that is recent development?

A. Yes.

Mr. Holden: That's all.

Redirect Examination

By Mr. Furey:

Q. As I understood it, Mr. Ruud told you that he had been planting grass and pasturing livestock there in previous years? A. Yes, sir.

Q. Did he tell you what he had been doing with the land prior to this uncertain situation that Mr. Holden spoke of came into being? A. Yes.

Q. What use did he put the land to at that time?

A. Pasture and hay and livestock and some grain.

Q. In reaching your conclusion as to the valua-

(Testimony of E. L. Newell.)

tion of that property, did you consider the use that Mr. Ruud was making at that time of the land, that is before the [227] project was authorized?

A. Yes, I did.

Q. And what was your feeling with regard to whether that was the highest and best use that the land could be put to?

A. He could use it either way. Honestly, my reason for placing the values that I did on the property was because I thought he was, at present, that is, because of the present market, that he was using the ground to the best advantage right now, and that was for the reason that cattle prices are down, it is not good, and when I attempted to figure it out on a basis of grazing and feeding cattle on the place, I found that it wouldn't justify the value that I put on it under the present day market, so I based my figure on the use that he is putting the ground to. I think that he is doing the most profitable thing at this time although if things should change and livestock prices come back and the support prices were off of grain, it would be a practical thing to switch back to livestock, I think that.

Mr. Furey: Thank you, Mr. Newell; that's all.

(Testimony of E. L. Newell.)

Recross-Examination

By Mr. Holden:

Q. Actually, you never had seen the property when it was [228] put to its highest and best use by Mr. Ruud, that is in a diversified type of farming?

A. The only time I have seen it is the times that I have mentioned here, but I would know what the situation would be.

Q. You would know that without seeing it?

A. I would know that from what he has told me and from what others have told me, and from my own observation.

Q. I believe you said, with reference to the farming practice, that it wasn't good practice to repeatedly raise the same type of crop?

A. Not continually raise the same crop, that is, grain, small grain.

Q. But that was the condition of the area when you did see it, the only time you ever did see it?

A. With the exception of that portion that was not farmed to grain.

Q. With reference to the Alpine area, Mr. Ruud likewise told you, or rather made the same statement to you, with reference to the method of operating that, that is, that it had been put to grain for the last few years due to the uncertainty of the time that he could occupy it?

A. Yes, and I went on and observed other properties that were not being cropped to grain, to get

(Testimony of E. L. Newell.)

my balance as to what could be grown there at the time. I would like [229] to state that I made a little error when I pointed out the spot that the brome grass was grown on. That is on the property adjoining. It doesn't matter, however. The answer would be the same, but I did point out the wrong spot.

Q. There was an area that raised brome grass?

A. Yes.

Mr. Holden: That's all.

Mr. Furey: That's all.

The Court: We will take a recess at this time for fifteen minutes.

November 9, 1955—3:05 o'Clock P.M.

W. J. CARRUTHERS

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Furey:

Q. Will you state your name, please?

A. W. J. Carruthers.

Q. Where do you reside, Mr. Carruthers?

A. Spokane, Washington.

Q. What is your business or occupation?

A. I am a real estate appraiser.

Q. How long have you been in that business?

A. Since 1926. [230]

(Testimony of W. J. Carruthers.)

Q. And how many years is that?

A. Not quite thirty years.

Q. Will you just briefly tell the Court and Jury what your experience has been as an appraiser during that time?

A. For five years I was employed as an appraiser by the firm of A. G. Stafford and Associates. During my employment with them we appraised the city and county of San Francisco, Alameda County, including the cities of Oakland and Berkeley and Alameda and all of the towns in the county, and also the entire group of Hawaiian Islands. Subsequently, after my return from this Hawaiian Island assignment, I was with the Home Owners Loan Corporation as Assistant Division Appraiser, appraising property for resale as repossessed property for resale to the general public. I was employed with them roughly for five years and subsequently I was appraiser and reviewing appraiser for the Corps of Engineers and was Regional Appraiser for the War Assets Administrations for the disposal of all types of surplus property directly after the war, and I was employed for a period of time by the Office of Price Administration, Rent Control, to make studies of hotels, auto courts, and multiple rental units throughout the Pacific Coast area. I have appraised property in Arizona, Nevada, California, Washington, Oregon, Hawaii and the Territory of Alaska. I have, since 1949, [231] been in Washington and Idaho. I spent most of that time in the Northwest, first employed as appraiser

(Testimony of W. J. Carruthers.)

for the Corps of Engineers on the McNary dam and for the past four years I have been in business for myself as an independent appraiser. During that time I have appraised properties in, as I say, mostly in Idaho, I have appraised about 600 properties at the Albeni Falls Dam and I have appraised property throughout Washington and in Northern Idaho and Montana during that time.

Q. Have you ever done any appraising for the Atomic Energy Commission? A. Yes.

Q. Where was that done?

A. That was at Idaho Falls and Rigby.

Q. Down in this area? A. Yes.

Q. And where is Albeni Falls Dam located?

A. That is in Bonner County on Lake Pend O'Reille.

Q. Mr. Carruthers, have you ever appraised Tracts 41, 77 and 34, involved here, the Bert Ruud ranch? A. I have.

Q. At whose request? A. At your request.

Q. Will you tell the Court and Jury briefly the time you were on the property and for how long?

A. I was on the property as has been previously mentioned [232] here, on May the 20th, 21st and 22nd. On the 20th I spent a little time on the property and on the 21st I spent almost the entire day and on the 22nd about half of a day on the property itself and several days that I was in the general area making another appraisal, and also familiarizing myself with the area and consulting with informed sources relative to the land in the area.

(Testimony of W. J. Carruthers.)

Q. You had not been in that area before that time? A. No, sir.

Q. And you made your investigation to familiarize yourself with local conditions?

A. Yes, sir.

Q. Did you make an investigation to find out what lands of this same type and similar land had been selling for in that area?

A. Yes; we talked to several purchasers of property on their land in that area and made as thorough an investigation and examination as possible to find out what sales had been consummated recently in the area of real property, property which might prove to be similar or comparable to this property.

Q. Did you discuss these properties with Mr. Ruud at any time?

A. Yes; he accompanied Mr. Newell and myself both days that I was on the property, that is, on the 21st and the 22nd, he was not home on the 20th, and I did not see him last [233] Saturday and Sunday when I again visited the property.

Q. Directing your attention to Tract 77, that is the Alpine tract, do you have an opinion as to the highest and best use to which that property could have been put on March 4, 1955, or within a reasonable time thereafter? A. Yes; I do.

Q. And what is that opinion?

A. That is for the production of small grains and hay.

Q. I neglected to ask you one thing, Mr. Carruthers, in your appraising experience, have you

(Testimony of W. J. Carruthers.)

had occasion to appraise farming and agricultural types of land?

A. Yes; throughout my experience I have appraised a great number of cattle ranches and in the past six or eight months I have appraised grain land in Oregon, Washington, Idaho and Montana, both dry and irrigated land.

Q. I believe that we have been over the physical characteristics of this ground so that everyone knows them pretty well. Mr. Carruthers, keeping in mind that the fair market value is the amount of cash which a buyer, willing to buy but not required to do so, would pay and the amount of cash or its equivalent that a seller, who is willing to sell but not required to, would accept, keeping that in mind, and also your opinion as to the highest and best use of that land, or rather the highest and best use to which that land could have been put, do you have an [234] opinion as to the fair market value of Tract Number 77 on March 4, 1955?

A. Yes, sir.

Q. And what is that opinion?

A. \$28,500.00.

Q. Now, directing your attention, Mr. Carruthers, to Tract 41B, the home ranch, do you have an opinion as to the highest and best use to which that tract could have been put on March the 4th, 1955, or within a reasonable time thereafter?

A. Yes; I do.

Q. And what is that opinion?

A. For growing small grain, hay and pasture.

(Testimony of W. J. Carruthers.)

Q. Bearing in mind the same definition of fair market value that I gave you a moment ago, do you have an opinion as to the fair market value of that property, excluding Tract Number 31, as of March 4, 1955? A. I have.

Q. And what is that opinion?

A. \$139,000.00.

Q. Now, with regard to Tract 34, do you have an opinion as to the highest and best use to which that little piece of land could be put? A. Yes.

Q. And what is that opinion? [235]

A. That is the same purpose, that is identical land, but it is cluttered up with a couple of little buildings, but for all practical purposes it is the same land.

Q. Bearing in mind the same definition that I have given you as to fair market value, do you have an opinion as to the fair market value of that tract on March 4, 1955? A. I do.

Q. And what is that opinion? A. \$250.00.

Q. Then your opinion as to the fair market value, the total fair market value of that Ruud ranch, all of the tracts, is what, Mr. Carruthers?

A. \$167,750.00.

Q. Now, Mr. Carruthers, without going too much into detail, will you tell the Court and Jury what factors, what considerations you had in mind in arriving at those figures, these valuations that you have testified to?

A. Well, the same general factors that have been mentioned here several times, the location, the cli-

(Testimony of W. J. Carruthers.)

mate, productivity, markets, schools and so forth, and then the topography of the land and the soil types of the particular places and the market for that and other similar types of property in the area, that is why we make an investigation for comparable sales in any area is to establish the market for land in the vicinity. Those are the primary [236] factors, of course, the adequacy, the condition of the improvements, is a factor; the water, as has been brought out here, is a definite factor also, especially when it is irrigated land. I took into consideration in my appraisal and in my establishment of the value, the fact that Mr. Ruud pointed out to us that he had grained this land due to the uncertainty of time, for a number of years, more than good husbandry would tolerate in most instances. However, I attempted not to discount this property due to this factor, which was beyond his control.

Mr. Furey: I think that's all; you may cross-examine.

Cross-Examination

By Mr. Holden:

Q. Going back to your qualifications, Mr. Carruthers, I understand you are a professional appraiser?

A. That is my profession.

Q. That is your business?

A. That is my entire business.

Q. Do I understand that you appraised all of the Hawaiian Islands?

(Testimony of W. J. Carruthers.)

A. Yes; I was in charge of the appraisal. We appraised the entire group of Hawaiian Islands for taxation purposes for the Tax Board of the Hawaiian Islands for the Territory of Hawaii, and I supervised the outside appraisals in that. [237]

Q. And you also did extensive appraisal work up in Alaska?

A. I appraised the Alaskan Communications System and their installations in Alaska and also in Seattle.

Q. And your only experience in southeastern Idaho, in Swan Valley area, and Grand Valley area, is the appraisal of the Ruud property and one other?

A. That is correct; two appraisals in that location.

Q. You never appraised any similar property in southeastern Idaho?

A. I have never appraised any in southeastern Idaho, any properties that are comparable to these two that I made here.

Q. You say you have not?

A. I have not.

Q. Then the only time that you have been on the Ruud properties were on those three days that you mentioned here in Court?

A. No; those were the only times.

Q. With the exception of last Saturday and Sunday?

A. Yes; five times I was on the property.

(Testimony of W. J. Carruthers.)

Q. But your appraisal was made prior to your visit there last Saturday and Sunday?

A. My appraisal was not completed until afterwards; that was a recheck on information that I wanted to be sure that I had, and that I had it correctly. [238]

Q. When was the appraisal completed?

A. It was completed, or reviewed, I should say, after I made my last visit and my last view on the property.

Q. And when was that?

A. Last Saturday and Sunday.

Q. Prior to last Saturday and Sunday you never had given Mr. Furey your figure on the appraisal?

A. That is correct.

Q. You never had given him any figures on the values?

A. I hadn't given any definite figure. I didn't say that I hadn't given him any figure, but I hadn't given him my definite figure because, as I told you, I wanted to recheck it.

Q. You gave him a figure prior to last Saturday or Sunday?

A. I gave him a tentative figure, yes, sir.

Q. And when did you give him that figure?

A. I don't remember just when that was; it was after my viewing the property in May and that is all I know.

Q. You never saw the property when it was in production and you had never seen any of the crops that it will grow or produce?

(Testimony of W. J. Carruthers.)

A. No; I have not.

Q. And you haven't viewed or have never seen any of the ranch area in Grand Valley to see what the area is capable of producing? [239]

A. Yes; I have seen what it is capable of producing.

Q. Have you seen it when the crops were on?

A. No; I haven't seen the land when the crops were on, but I have seen stacks of hay in the fields and so forth.

Q. You saw them as they were stacked?

A. Yes; just the other day.

Q. And you saw them in May?

A. No; they had fed most of it up then as you know.

Q. So now you are basing the production of these crops on what you observed with reference to the stacks in the field when you were there last week?

A. No.

Q. You took that into consideration?

A. As I told you, I checked last week to be sure that I was not off base in anything.

Q. Have you made any appraisals for loan purposes?

A. I cannot remember of making an appraisal for loan purposes, no—just a minute, I will take that back. I made several appraisals for the San Francisco Federal Savings and Loan and also for the Golden Gate Federal Savings and Loan, and two or three appraisals for the Veterans and a few F.H.A. appraisals for loans along the line.

(Testimony of W. J. Carruthers.)

Q. Then you have made some?

A. Yes; I have made some, because I have made almost every [240] type of appraisal that you can think of.

Q. And you have had a lot of experience in all of those fields? A. Yes; I have.

Q. Primarily though you have been making appraisals for the Government?

A. When I was employed by the Government as a salaried employee, yes. At other times I have worked for the Government and for private individuals and for estates and I suppose you might say for anybody that could pay.

Q. For practically every type of Government institution and agency?

A. Yes; I have done a good deal of work for Government institutions.

Mr. Holden: That's all.

Redirect Examination

By Mr. Furey:

Q. Mr. Carruthers, would you be doing much work if you didn't work for those various people from time to time?

A. Well, I might go a little hungry.

Q. Mr. Carruthers, you don't represent that you are or were familiar with that area, not ever having been in there before? A. No, sir. [241]

Q. Did I understand you to say that you investigated up there to find out what the local con-

(Testimony of W. J. Carruthers.)

ditions were and what property was being sold for and purchased for? A. That is correct.

Q. And it is on that, and those other factors that you testified to, that you base your appraisal?

A. That's right.

Q. And you didn't try to represent to those folks that you were as familiar with that country as someone who had lived there all of their lives, did you? [242]

* * *

D. V. GROBERG

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Holden:

Q. Will you state your name, please, for the reporter? A. Delbert V. Groberg.

Q. Where do you reside?

A. Idaho Falls, Idaho.

Q. How long have you lived in Idaho Falls?

A. I was born there in 1906.

Q. And that has been your home town?

A. Except being away to school and for a period when I was a child I lived with my grandparents in Weber County, Utah.

Q. Are you married? A. Yes, sir.

Q. Do you have a family? A. Yes.

Q. What is your business or occupation? [260]

A. Real estate broker and appraiser.

(Testimony of D. V. Groberg.)

Q. First, let me ask you with reference to the appraisal feature of your business. Have you had training as a real estate appraiser, any special training? A. Yes.

Q. Will you state to the jury what special training you have had as a real estate appraiser?

A. The American Institute of Real Estate Appraisers, which is a professional branch or a technical branch of the National Association of Real Estate Boards which puts on case studies at various universities in connection with their departments of commerce and departments of rural economics, and during the period starting ten years ago I have taken four of those university case study courses sponsored jointly by the universities and the National Institute of Real Estate Appraisers. The requirements are simply that you complete certain studies and demonstrate your ability to handle certain problems and then have a background in the local area of at least ten years' experience in appraising, and complete certain examinations, and have character references, recommendations from other appraisers, and by completing certain studies you are awarded a membership in the American Institute, and I have completed that. I have completed those studies and the other [261] requirements.

Q. And the membership is similar to what other type of professional groups?

A. Well, the most closely connected, I guess, or most similar, is an accountant, one who is an ac-

(Testimony of D. V. Groberg.)

countant, after completing certain works, becomes a C.P.A. or Certified Public Accountant, and one completing this designated outline of work is a M.A.I., and a member of the American Institute.

Q. You took some special training at schools with reference to that? A. Yes, sir.

Q. Now, with reference to your experience as an appraiser, have you had occasion to make real estate appraisals? A. Yes.

Q. In what areas?

A. Primarily in southeastern Idaho.

Q. For how long a period have you made appraisals, even prior to the time that you became associated with the American Institute?

A. I had in excess of ten years experience prior to 1949 when I became a member of the American Institute of Real Estate Appraisers.

Q. Have you had any occasion to appraise farm properties? A. Yes.

Q. Have you ever had any farming experience yourself?

A. During the period that I lived with my grandparents in Weber County, we were on a farm for fifteen years, that [262] was as a boy, from the time I was four until I was nineteen.

Q. Do you own any farm land now?

A. Yes, sir.

Q. Are you operating the farm land?

A. Both ways; we have some that we do a portion of the operation and some we have tenants doing the operating.

(Testimony of D. V. Groberg.)

Q. And where are those farming lands located?

A. In the vicinity of Idaho Falls.

Q. Now, then, with reference to your real estate business, how long have you been in the real estate business?

A. I started a real estate office in Idaho Falls in 1929 and I have been there continuously ever since.

Q. Just what type of properties do you handle in your real estate business?

A. It is primarily an agricultural valley, and during the entire period that we have been in business there we have had a substantial affiliation with selling farm properties, agricultural land, although we also sell city properties in Idaho Falls.

Q. Have you ever made any appraisals for landowners in connection with sales of property?

A. Yes.

Q. Is that a customary procedure?

A. Yes; that is the way we help to determine what the fair market value will be; we appraise it to determine what [263] it will bring, to obtain a listing on the farm.

Q. Did you ever have any branch office in any other areas in the Snake River Valley?

A. Yes; for ten years we had an associate office at Afton, Wyoming, which is about 100 miles from Idaho Falls.

Q. Where is Afton, Wyoming, with reference to the Ruud home ranch?

A. It is just about 25 miles from Alpine.

Q. Where the Alpine ranch is?

(Testimony of D. V. Groberg.)

A. Yes, sir.

Q. Now, have you ever held any offices in real estate organizations? A. Yes.

Q. Whereabouts?

A. I have served as President of the Idaho Falls Real Estate Board, and as a director and president of the Idaho Real Estate Association. I have served three different times as President of the Idaho Falls Real Estate Board.

Q. When were you president of that association?

A. The Idaho Real Estate Association in 1947 and '48.

Q. Any other offices?

A. I am a Director of the National Association of Real Estate Boards.

Q. At present you hold that position? [264]

A. Yes, sir.

Q. Have you ever held any other offices or positions of a civic nature in Idaho Falls?

A. Yes, sir.

Q. Will you state what they were?

A. I served as President of the Idaho Falls Chamber of Commerce, President of the Idaho Falls Kiwanis Club, and President of the Community Chest.

Q. Now, did you make an appraisal of the Bert Ruud home ranch, known as Tract Number 41?

A. Yes, sir.

Q. Did you make an appraisal of the Ruud Alpine ranch, known as Tract Number 77?

(Testimony of D. V. Groberg.)

A. Yes, sir.

Q. At whose request? A. At your request.

Q. Might I ask you, first, are you familiar with these properties, and with lands located in the area of the Ruud home ranch and the Ruud Alpine ranch? A. Yes, sir.

Q. And over how long a period of time have you been?

A. Since I started the real estate business in Idaho Falls in 1929.

Q. And you have been familiar with the area where these lands are located? [265]

A. Yes, sir.

Q. And are you familiar with land values of farm properties in the area of the Ruud land, which is involved in this suit? A. Yes.

Q. And with land values of properties in southeastern Idaho generally? A. Yes.

Q. Now, will you tell the jury when you first went to the Ruud properties for the purpose of making your appraisal?

A. Yes; the first visit I made was June 1st, 1953.

Q. Did you ever visit the property on any other occasion? A. Yes, sir.

Q. On what occasion?

A. On July 7, 1953; on August 10, 1953; on October 27, 1953; on August 6, 1954, and on August 31, 1955. With reference to making actual inspection I went up through the valley at other times besides that, however.

Q. When you first went on the property what

(Testimony of D. V. Groberg.)

did you do, just briefly, when you first went to make the appraisal?

A. After I had the assignment to make an appraisal of the property?

Q. Yes.

A. Well, I considered the factors that would go into making up the value. [266]

Q. What did you do first when you got to the ranch?

A. I got in touch with the owner of the ranch.

Q. Did he show you around?

A. I had him show me every point that there was on the ranch, all the corners, all the improvements, all the ditches, and all the factors that I considered which were important to see.

Q. Did he point out the boundary lines?

A. Yes.

Q. Did you have a map of the ranch when you were there?

A. I am not sure whether I did the first time, but I had a map during a number of the times.

Q. Just what did you do when you went about to look the ranch over, in addition to what you have stated? Did you observe the lay of the land?

A. Yes.

Q. Did you examine the soil? A. Yes, sir.

Q. Did you check into the improvements?

A. Yes.

Q. Just what did you do with reference to the improvements, how did you inspect them?

A. I tried to consider what I was trying to de-

(Testimony of D. V. Groberg.)

termine, the market value, and I considered the improvements from the standpoint of how desirable they would be for someone to own. The conveniences, the location, the appropriateness [267] of the buildings to the type of operation that I deemed would be proper and a typical operation. I considered the highway, the services, that is, the services by mail and the service by bus, transportation, electricity, in fact all of the facilities that were available for the convenience for one that would be a typical purchaser or a prospective purchaser for that type of ranch.

Q. Did you make investigation to see what the mail service was? A. Yes, sir.

Q. And what did you find that to be?

A. Daily mail service, six days a week.

Q. Did you make any investigation to determine what public transportation services were available? A. Yes, sir.

Q. And what did you find?

A. The daily transportation the year round to Idaho Falls and to Wyoming.

Q. What type of transportation?

A. A small Greyhound bus was the type of public transportation.

Q. Passenger type of transportation?

A. Yes; they even stop right at the ranch to pick up and unload passengers.

Q. And you say that is a year round [268] service?

(Testimony of D. V. Groberg.)

A. Yes; during some of the year, during the summer months, there are two busses scheduled.

Q. What other factors, that is, with reference to churches, schools, and the like, did you consider?

A. The schools and churches are close, there is school bus service daily.

Q. And where are they picked up by school bus?

A. Right at the highway, at the ranch.

Q. And where are the churches located?

A. There is one over in Wyoming, there is a church at Swan Valley, there is a church at Irwin, and, of course, the churches in Ririe and at Idaho Falls and also over in Jackson.

Q. Did you make an investigation to determine whether or not there was television reception in the area of this ranch?

A. Yes; there is television reception.

Q. And what did you determine with reference to electric power?

A. That's one of the factors of the convenience, is the R.E.A. serving this area with ample electric power, even heating water and such.

Q. Did you make any investigation to determine whether or not there was any public truck transportation?

A. Yes, sir; there is livestock truck and also trucking for pick-up items served by commercial lines, the M and M, [269] the Hadley Brothers, Ross McCowan, those are the ones that I am familiar with that travel that highway and pick up livestock and package items. and make it convenient

(Testimony of D. V. Groberg.)

for anyone there to be in communication or in touch with the market.

Q. Did you investigate and observe the ditches on the place? A. Yes.

Q. Did you make any investigation with reference to the water? A. Yes.

Q. And the water rights? A. Yes.

Q. Did you observe the fences on the ranch?

A. Yes, sir.

Q. Did you observe the domestic water supply, if any, available to the ranch? A. Yes.

Q. Did you check and observe the location of the Ruud home ranch and the Ruud Alpine ranch with reference to highways? A. Yes.

Q. On what highways are they located?

A. The home ranch is on U. S. Highway 26, running from Idaho to Wyoming and connection with U. S. Highway 89 at Alpine, which is a prominent highway connecting Utah and Wyoming with the Yellowstone Park. [270]

Q. Did you check to determine what highways are at the Alpine Ranch?

A. Yes, sir; Highway 26 goes by the Alpine ranch and has a junction with Highway 89, U. S. 89, at that point.

Q. Did you check, or do you know, the total acreage in the Ruud home ranch, Tract Number 41?

A. Yes.

Q. How many acres are there?

A. It has a total acreage of 673.12, but there is two acres that I understand that is separated, and

(Testimony of D. V. Groberg.)

also out of that acreage there is a 16.56 acres, and that portion was given for the public highway.

Q. Did you determine, in making your appraisal, the amount of acreage taken by the Government in connection with the Palisade project?

A. Yes.

Q. Did you, in making your investigation, take into consideration and determine the acreage of the Alpine ranch?

A. Yes, sir.

Q. Did you investigate and determine the acreage taken in connection with the Palisade project from the Alpine ownership?

A. Yes, sir.

Q. Now, Mr. Groberg, as a result of your investigation and going on to the premises, onto this property, and considering these matters, do you have an opinion as to [271] the highest and best use of the Ruud home ranch, Tract Number 41, on March 4, 1955?

A. Yes, sir.

Q. And what is that opinion?

A. It has, as its highest and best use, for a diversified farm, principally irrigation farming with an additional portion of livestock raising, is in my mind, the proper use for some of the land, and the proper use for all of the land diversified farming, raising grain, hay and other cultivated and irrigated crops, some pasture, and feeding of livestock.

Q. Did you make an investigation to determine what crops were grown and had been grown on the Ruud home ranch?

A. Yes, sir.

Q. And did you make a further investigation to determine what crops were grown in that area?

(Testimony of D. V. Groberg.)

A. Yes.

Q. Did you take into consideration what crops could be grown there? A. Yes, sir.

Q. What crops did you consider would be most suitable for raising on the home ranch?

A. In a rotation program of farming there I would consider grain, wheat, barley, oats, all would be practical.

Q. What type of grain, did you state? [272]

A. Yes; wheat, barley and oats.

Q. Any other crops?

A. Yes; alfalfa hay in rotation would be very practical. I observed it in the vicinity being raised. And I am of the opinion also that there are portions that would be adaptable for raising seed potatoes. It is good soil and good climate and they are being raised in that vicinity.

Q. Did you make investigation to determine whether seed potatoes are raised in that vicinity?

A. Yes.

Q. Are you familiar with areas in Idaho where seed potatoes are raised? A. Yes, sir.

Q. In what areas do you know of where they raise seed potatoes?

A. The best seed potatoes come from the higher elevations; we have purchased them from Driggs, Idaho; from Ashton, Idaho, and also over in the Star Valley section of Wyoming.

Q. Do you know how those areas compare in elevation with the elevation of the Ruud ranch, at the home ranch or the Alpine ranch?

(Testimony of D. V. Groberg.)

A. Most of those are a little higher in elevation, but approximately the same. [273]

Q. Have you ever observed the general area where seed potatoes have been raised in Driggs and Ashton and so on? A. Yes, sir.

Q. And how does it compare for similarity, as to the type of soil and so on, with the Bert Ruud home ranch? A. It is similar.

Q. Did you take into consideration in making your appraisal the climatic conditions?

A. Yes, sir.

Q. And did you make any investigation with reference to the precipitation? A. Yes, sir.

Q. Now, as a result of your investigation of that Bert Ruud Alpine ranch, which is known as Tract Number 77, do you have an opinion as to the highest and best use to which that tract of land could be put on March 4, 1955, or within a reasonable time thereafter? A. Yes, sir.

Q. What is that opinion?

A. Diversified farming, primarily raising barley, oats or wheat in rotation with alfalfa hay, and also it would be my opinion this should be used in connection with the other ranch in a livestock portion of the total ranching operation. [274]

Q. What crops could be raised on that ranch?

A. Grains, barley, oats, wheat and alfalfa hay.

Q. What types of grain?

A. Wheat, barley and oats.

Q. Did you make any investigation to determine whether or not wheat was raised in that area?

(Testimony of D. V. Groberg.)

A. Yes.

Q. And you took that into consideration?

A. Yes.

Q. And did you make any investigation to determine whether or not seed potatoes could be raised in that area?

A. They are being raised in that area. I didn't mention them and I didn't specifically consider seed potatoes on that ranch, but I am sure they could be raised there, too.

Q. Now, did you discuss with Mr. Ruud what his lands were capable of producing, or what they had produced?

A. Yes.

Q. And did you discuss with others in the area the production and income of farm lands?

A. Yes, sir.

Q. Now, Mr. Groberg, by reason of your experience in dealing in real estate, and by reason of your investigation and study and analysis of the Ruud home ranch, which is Tract Number 41, and bearing in mind that the term fair market value means the price in money or money's worth, that a [275] willing seller, not compelled to sell, would accept, and the price that a willing buyer, one not compelled to buy, would pay, and taking into consideration the highest and best use to which the Ruud home ranch, Tract Number 41, could be put on March 4, 1955, do you have an opinion as to the fair market value of that ranch, Tract 41, on March 4, 1955, for the land and all improvements?

A. Yes, sir.

Q. What is that opinion?

A. \$200,500.00.

(Testimony of D. V. Groberg.)

Q. Now, bearing in mind the same definition with reference to fair market value, and the same factors with reference to the highest and the best use, do you have an opinion as to the fair market value of the Ruud Alpine ranch, Tract 77, on March 4, 1955? A. Yes, sir.

Q. What is that opinion? A. \$48,500.00.

Q. Bearing in mind the same definition with reference to fair market value, and the same factors to be taken into consideration, do you have an opinion as to the fair market value of Tract Number 34, this little two-acre tract right here (indicating) in this area shown in white on this map? [276]

A. Yes, sir.

Q. What is that opinion? A. \$350.00.

Q. Now, what factors did you take into consideration in arriving at—I will ask you this first—will you strike that, Mr. Reporter—do you have an opinion, bearing in mind the same definition and the same matters that you considered, do you have an opinion as to the fair market value of the entire Ruud ownership, the whole ranch, Tract 41, the Alpine ranch, Tract 77, and the two-acre tract, Number 34, as of March 4, 1955? A. Yes, sir.

Q. State to the jury what that figure is.

A. \$249,350.00.

Q. What factors did you take into consideration in arriving at the fair market value of the Ruud Alpine property, Tract Number 77, what are the reasons, what are your reasons? How did you ar-

(Testimony of D. V. Groberg.)

rive at that figure, what did you take into consideration?

A. I tried to consider the factors that would enter into the minds of willing people, negotiating for a deal, to determine what it would be worth on the market. I considered the location, I considered the lay of the ranch, the type of operation, the type of crops that could be grown, the productivity of the soil, the use [277] to which some of the property along the highway could best be put, the value of the ranch also in connection with the other ranch.

Q. What do you mean by that? Do you mean the value of the Alpine ranch in connection with the other? Was that a factor that you considered?

A. Yes, sir.

Q. Will you just explain what that factor is?

A. Well, one set of buildings, for instance, the home, one home, one set of machinery and one management could handle it all—could handle it in rotation. The feed could be in one place. I mean by that, in rotation farming the feed could be in one place, the fields could be used for feed if the livestock were on the other place. In spring pasture and fall pasture the crops grown could be used in connection with a total operation, and not have to just be put on the market or subject to other conditions. It is close, the Alpine ranch is about three and a half miles from the south end of the home ranch. It is close, it is on the same highway.

Q. What do you mean by one set of farm machinery? What is the advantage of that?

(Testimony of D. V. Groberg.)

A. Farming is an expensive operation. If you have expensive equipment, and you have to have good equipment in order to farm efficiently. One set of tractors would [278] handle both places. One set of planters. One set of harvesters. One set of plows. One ownership would be able to operate efficiently this tract; it would be more of an economic unit than if it were isolated alone and a person had to have all that equipment and just have the one ranch.

Q. Then the total number of acres in this one ownership would be an important factor with reference to its economic operation? A. Yes.

Q. Now, Mr. Groberg, I would like to direct your attention to Exhibit 5, and will you state to the jury what that exhibit is, if you know, and then I will ask you questions with reference to it?

A. This area is the Ruud Alpine ranch.

Q. How many acres in that ranch?

A. There's 328.87 acres, almost 329 acres total.

Q. And how many acres with reference to the total is the Government taking?

A. The entire tract.

Q. Now, will you tell the members of the jury just what the highest and best use, in your opinion, is as to the Alpine ranch, with reference to the area located on the highway?

A. This area right here (indicating), U. S. Highway Number 26, comes along that line; that is the State line. United States Highway Number 89 comes right in there; there is [279] a junction right

(Testimony of D. V. Groberg.)

at about this point (indicating). U. S. Highway 89 coming in from Afton or Star Valley and coming on to Salt Lake City, right in that area (indicating) and in this direction (indicating) going on to Yellowstone Park. And it is my opinion that the best use of that highway land is for townsite purposes.

Q. How many acres in that area?

A. There is six and a half acres in this area shown on the scale of this map, the small tract right in there (indicating).

Q. In what color—is there an exclusion to that area there which is not included in the Ruud ownership?

A. Yes; there is a hundred foot square on Highway 26 that is excluded; that was sold off some time ago.

Q. Now, what other factors did you take into consideration in reference to the highest and best use of that yellow strip there, the six and a half acres, I believe you said for townsite purposes?

A. Well, there is a post office there, there is a hotel, a cafe and store building there, and there are buildings across the street. I tried to take into consideration in arriving at this that there was no influence like the Government taking, I considered that this was a free market deal, just like the definition of this problem was, what is the fair market value, without any influences other than those that would be typical of the market, [280] where there was a prominent highway and there was already a nucleus of stores and such buildings,

(Testimony of D. V. Groberg.)

where there was a state line, where there was a junction. There would naturally be a possibility and a probability for additional land being required for the growth of that townsite. To me it is a townsite already, with the post office, hotel, cafe and store, and the fact that it is on the state line and also on these highways, and has those buildings, those services which the public require, that to me made it practical and very probable, without this influence which I completely dismissed, that it would develop into a small townsite.

Q. And by this influence you mean the Palisade project development?

A. Yes; that would naturally stop it, as soon as they knew that was to be taken, of course, they would not want it.

Q. And how long has that been, do you know?

A. Well, I remember that when I was President of the Chamber of Commerce back in 1941 or '42, we felt that we had the thing definitely cinched then and that it was going to go through.

Q. Do you know the date that the project was authorized?

A. I think it was in 1941, or right at that time. I think there was an appropriation in 1941, as I remember it, I know that we felt in Idaho Falls that was it.

Mr. Holden: May I reserve that, [281] your Honor, and have that shown in the record when it was officially authorized?

(Testimony of D. V. Groberg.)

The Court: I think you can stipulate to that and it won't be necessary to put on any evidence.

Mr. Holden: Yes; thank you, sir.

Q. Do you have an opinion as to the fair market value of the six and a half acres shown in yellow for townsite purposes? A. Yes.

Q. And what is that opinion?

A. My opinion is that it would be worth \$750 an acre for the six and a half acres, and that comes to about \$4,875.00.

Q. For the townsite area? A. Yes, sir.

Q. Are there any improvements located on the area shown on Defendants' Exhibit Number 5, in yellow? A. Yes.

Q. Did you take those into consideration?

A. Yes, sir.

Q. Did you place a separate valuation on those improvements? A. Yes, sir.

Q. Will you state what those improvements are?

A. There is a cafe and store building, with water in the building, a place for eating and also some rooms in [282] the back for living accommodations. There is also a hotel building——

Q. ——First, with reference to the first building, did you determine any square footage in that building, did you determine what the square footage was? A. Yes, sir.

Q. And you took that into consideration?

A. Yes, sir.

Q. And the foundation? A. Yes, sir.

(Testimony of D. V. Groberg.)

Q. What valuation, special valuation, did you give that improvement?

A. I considered all of the factors that I thought were important and I gave it a valuation of \$3,000.00.

Q. And now, with reference to the other improvements on that land in yellow?

A. The hotel building is a seven-room hotel building complete with two complete bathrooms, each having complete plumbing, bathtub, lavatory and toilet. There is heat in each room. The building is adapted for rooms and is known as the hotel there. I measured the building and had the footage, and in my opinion it had a very definite value.

Q. What valuation did you place on it?

A. \$8,000.00.

Q. Is it in good condition of repair? [283]

A. Yes; it has been maintained well.

Q. Did you observe and take into consideration the well?

A. Yes, sir.

Q. Located on the area?

A. Yes; that is a good modern pressure system well; it serves water to the hotel building and the store building and cafe.

Q. What valuation did you give to the well?

A. \$1,000.00.

Q. Now, are there any other improvements that you observed on Tract 77, the Alpine ranch?

A. There is a small building behind the cafe building that has been adapted for the storage of

(Testimony of D. V. Groberg.)

grain; it has a capacity and utility to an operation there. I figured that it had some value.

Q. What valuation did you place on it?

A. \$300.00.

Q. Now, are there any other improvements in connection with that property that you observed?

A. That is all the improvements I think that I considered, although I considered the piping that came from the well.

Q. Now, will you tell the court and jury what you did with reference to the classification of the farming land itself, what you did in going over it and observing it, and so forth?

A. That is quite a large tract, as you can see. I went over it on each occasion and it has some difference in the [284] soil. There are some small areas that have outcroppings—there is a bluff along here with an elevation change.

Q. What color is that?

A. It is a brown area here (indicating); that is a grade change; this land is higher than this land. This goes down slightly above the river; in my opinion there is an eight- or ten-foot grade change there. This, of course, being on the grade change, is not very valuable land for farming. This is very good, and this other is good (indicating). This that appears in brown here, in my opinion, had some value, but I excluded that from the farming land.

Q. How many acres would the area be that is shown in brown?

A. About 10.2 acres.

(Testimony of D. V. Groberg.)

Q. What, if any, valuation did you place on that 10.2 acres?

A. I valued it at \$10.00 an acre; it had some value. It raises some grasses and has a nominal value. I placed a value of \$10.00 an acre on that.

Q. What is the area shown in red on the map? Will you explain that to the jury, please?

A. The area in red is the farming land; this is down on the grade change. This is not uniform in type. There is some that, well, I would say it is a mountain soil, a dark soil and it has some showing of mountain shale that has come down and built up, it is good soil. I observed it in crop, and as you observe the crop it [285] is uniform. I had difficulty in making any classification change in this entire field, the crop would be about the same height, the seed about the same. I know that there is some difference, but it is good farming soil; it raises a crop and I classified it all, except these portions that I mentioned, as farming land. I didn't try to make any isolation of one area and say it is definitely a lot better than the other; it is all farming land. I classified the land in red as the top farming land on that ranch.

Q. Is it uniform in the way it lays pretty well?

A. Yes; it is not hilly, there are no great inclines and there wasn't enough difference in types of crops that were raised that I could see for a justification of any further classification.

Q. What valuation, if any, did you place on the area shown in red? A. \$100 an acre.

(Testimony of D. V. Groberg.)

Q. And do you know the acreage of that area?

A. Yes, sir; there is 312.17 acres.

Q. Did you make any investigation from anyone in the area to determine the practice with reference to farming the Alpine ranch each year?

A. Yes; I did.

Q. What did you determine or find out?

A. This entire red area, to my own knowledge, has been [286] farmed every year for the past three years that I have been there. I have been up and down the road and that has been my impression, that that has been the practice up there, but from my investigation of others there, I have determined and I am of the opinion that that is the practice in that whole area, to raise crops every year.

Q. Now, what type of operation could that best be adapted to, with reference to the raising of crops?

A. In my opinion to have it operated in rotation would be the best way. I observed alfalfa in areas adjoining, and I know that it will raise alfalfa. I would say to have it in grain for three or four years and then to alfalfa, to have the rotation of that type, and maintain the soil and have the diversification, that would be the better use and the proper use.

Q. Did you take into consideration the precipitation in the area?

A. Yes, sir.

Q. And in addition to the record, are you familiar as a result of your own knowledge and experience and familiarity with that area over a pe-

(Testimony of D. V. Groberg.)

riod of years, that there is sufficient precipitation to raise those crops?

A. Yes, sir. I have observed that they have always raised crops, that is from my own knowledge.

Q. Over what period of time? [287]

A. Well, since 1929 I have been familiar with that.

Q. And your office that you spoke of, at Afton, Wyoming, is it necessary to go past this area in order to get to your office there?

A. Yes; we would leave Idaho Falls at 7:00 and be at Afton at 9:00 o'clock, and this is the road that we would follow (indicating).

Q. And you are familiar with the area in that sense? A. Yes.

Q. Now, did you make any investigation to determine the yield of crops that could be raised on that land? A. Yes, sir.

Q. And what did you determine?

A. Well, in a typical operation with rotation, and I observed that this isn't typical, it isn't the best use to have it remain in the same crop year after year, as has been done during the last three years that I have been specifically familiar with it, but with rotation it is my opinion that this land would yield around two and a half tons of hay per acre, and that it would yield——

Q. ——How much would it yield on the first cutting?

A. Oh, one and a half tons, I would say, and maybe two tons. That would be the best crop, I

(Testimony of D. V. Groberg.)

would say, the first one. I have assumed regarding this that it is dry land, except for the water that it gets from [288] precipitation.

Q. And have you seen hay in the area, on similar land?

A. Yes, sir; not right in here (indicating), but right close.

Q. Now, then, with respect to the production of other crops, what did you determine?

A. Well, it is my opinion that in raising wheat it would yield 25 bushels if it were in rotation and the soil were kept built up, it would be about 25 or 30 bushels to the acre.

Q. And with respect to any other types of grain?

A. Barley and oats would be some more than that.

Q. Did you check or take into consideration whether they could raise alfalfa seed?

A. Yes; I harvested some alfalfa seed right there, beautiful alfalfa seed. I observed it being raised right there on volunteer alfalfa, and in my opinion it would raise excellent alfalfa seed.

Q. Did you check with other people in the area to determine whether they had raised wheat there?

A. Yes, sir.

Q. Did you also check with Mr. Ruud in that regard?

A. Yes, sir.

Q. Now, with respect to the home ranch, Defendant's Exhibit Number 6, will you state what you did there with reference to soil classification, with reference to classifying the land, and if you

(Testimony of D. V. Groberg.)

wish, in order to explain the [289] classifications and the value that you placed on it, you may approach the map.

A. This is a large ranch, as you can see; it is approximately three miles——

Q. ——First, would you point out the roadways and where the Snake River is, so that the jury may understand?

A. Coming from Idaho Falls north, going to the ranch from Idaho Falls, this is the point here where you would go through the ranch on Highway 26.

Q. Where is Alpine now with respect to the lower portion of this map?

A. I would judge it is about three and a half miles.

Q. In which direction? A. South.

Q. And now, the river?

A. This is the Snake River, flowing north, this ranch, this area in here.

Q. Now, Mr. Groberg, will you tell the jury what, if any, classification you made of the soils on the home ranch?

A. These colors, if you can see them from over there, I will start with this small section, this yellow section, these sections are hillside. This ranch meets the hills along the east line; this is classified as hillside land or grazing land and it rises quite rapidly. There is 3.9 acres in these two together and hillside pasture or hillside grazing is the [290] classification.

Q. Did you give it any special valuation?

(Testimony of D. V. Groberg.)

A. Yes, sir.

Q. What valuation?

A. Those acres in those two areas I valued at \$40.00 an acre.

Q. Then proceed, Mr. Groberg.

A. These areas in green, there were some areas where there were abrupt outcroppings, little areas that were not adaptable to the farming operation. You will see them in green sections there. You see this area here, these added up to 8.3 acres.

Q. That is the green?

A. Yes, sir; this is the green area; it is very small, this one here; this is the largest one and it has about five acres and the other together about there. There is a total of 8.3 acres. We classified that as grazing land; it does have some feed on and in a diversified operation it would definitely have a value, and in my opinion I regarded it as worth \$25.00 an acre.

Q. At this point, let me ask, do you know whether there are any metal granaries on the home ranch?

A. Yes.

Q. Will you locate them on the map for the jury, if you can? I understand there are 20 of the metal granaries.

A. Yes, sir; that is another use for this land I spoke of. They are located on a portion of this five-acre tract. [291]

Q. And what is that type? Is that native grass on that, or is it a brush type?

A. Well, it has not been cultivated.

(Testimony of D. V. Groberg.)

Q. Now, will you proceed with your explanation of the classification?

A. Yes; the next classification is the brown area shown in there.

Q. How many acres in that strip of brown that you designated there?

A. This is ten acres. It is right at the entrance of the homestead, the farmstead, from the highway.

Q. Where is the house on the map?

A. The house is located right here.

Q. Will you trace the road that goes in from the highway to the ranch property?

A. This is the highway coming along here, and this is the ranch roadway to the improvements, right there (indicating).

Q. To the house and garage and those buildings?

A. Yes, sir.

Q. Then that ten acres in brown is located near the entrance way to the ranch?

A. Yes, and along the highway—the roadbed of the highway was a factor there, and there has been a little extra turning up of the gravel and the soil, which isn't quite so productive, and that we classified in the brown there [292] as a particular type of soil that wasn't quite as good as the other soil.

Q. Now, will you locate the other areas in brown with reference to the ranch?

A. This area on the east side of the highway where you saw it there, last year that has been in weeds and prior to that it was in sagebrush and has some rock on it, and there were some problems

(Testimony of D. V. Groberg.)

and I assume that was the reason that it wasn't brought into cultivation. It is land that can be cultivated and can be cropped, but it isn't quite so desirable to handle from the standpoint of cropping, as some of the other lands.

Q. How many acres is in there in that strip?

A. A little over ten.

Q. And what other areas in brown?

A. There is a swale that goes along here that carries some floodwater, it is not as good to handle but it raises crops, it has sufficient soil and it is a question of how fine you can draw the line, and, in my opinion, it wasn't quite as good to handle because of having that swale and a steeper incline. That is an area of about 7.3 acres; we classified that portion as not quite as desirable as the other land.

Q. And is there any other area in brown?

A. Yes; this area down at the end. It is similar. It is [293] good ground, but there are some problems attached to it. In my opinion it came in the same classification, not quite as good as the other land.

Q. And what valuation did you place on that area in brown?

A. The acreage in that brown is 38.8 acres. It is all irrigated and, in my opinion, well, I have classified it as irrigated land with the exception of this piece (indicating) which wasn't irrigated, but, in my opinion, it fell into the same classification, and I valued it at \$175.00 an acre.

(Testimony of D. V. Groberg.)

Q. Now, is there any other soil classification?

A. Well, the next on this plan of going up the scale in number of acres and the better types of land, this area in the extreme north of the farm——

Q. ——What color is that?

A. That is in the purple, this area where there is two acres that is out in this exhibit. That is hill-side soil, beautiful soil, this is hill right here that comes down this way and it has not been irrigated. There is a water right for the entire property, but that has not been irrigated.

Q. And how does that lie?

A. It is a beautiful field and it rolls gently and slopes down from the hill.

Q. It is not a hill?

A. No. The hill is up here. This is land that just slopes [294] gently. It is very easy to handle and I regard it as excellent soil but I didn't regard it as irrigated land.

Q. Even though there is water?

A. That's right, because it has not been irrigated and, in my opinion, it raises excellent crops without irrigation.

Q. And you checked with Mr. Ruud and it had not been irrigated?

A. Yes, sir; that's right.

Q. Did you make an investigation to determine the practice as to whether or not it could be farmed each year?

A. Yes, sir.

Q. How many acres is there in that portion?

A. 90 acres in this portion.

(Testimony of D. V. Groberg.)

Q. And what is the practice with respect to farming it each year, raising a crop each year?

A. My familiarity during the last three years has been from investigation that it has been farmed every year. My investigation conducted with Mr. Ruud and with the neighbors there, in my opinion, it has been farmed and crops raised every year for the past three years, and, in my opinion, that is the proper way to farm that land.

Q. Have you observed farming conditions in this area prior to the time you were called up to appraise this land? A. Yes, sir.

Q. And what did you observe with reference to farming practice?

A. In this immediate area, and on other adjoining farms, on [295] that land they raise a crop every year.

Q. What type of crop is that suitable for raising?

A. That is very suitable for grain, barley, oats and wheat and, in my opinion, that would raise excellent seed potatoes.

Q. And with reference to hay?

A. This adjoining there raises some of the best dry land alfalfa that I have seen, and I am sure that that would raise a splendid crop of alfalfa.

Q. Have you ever seen any alfalfa on land that is not irrigated that is contiguous to that land?

A. Yes, sir; adjoining that.

Q. Do you know what the practice is with reference to seeding that area to hay?

(Testimony of D. V. Groberg.)

A. Yes, sir. My experience has been in the area generally, that is, in southeastern Idaho, my experience is that they plant a nurse grain crop, and also plant the alfalfa seed. The alfalfa seed grows with the grain, you harvest the grain, get your grain crop, that is the practice and that is the experience I have had and, in my opinion, that is the proper way to seed alfalfa and rotate it in this area.

Q. So that you raise a crop every year?

A. That's right.

Q. Did you check to determine whether or not that is the practice in that area? [296]

A. Yes, sir; with the neighbors, and those who have been rotating in that area, that is the practice.

The Court: We will take a recess for fifteen minutes at this time.

November 10, 1955—3:00 P.M.

Q. What other classifications did you make of the soil, can you indicate by color?

A. This section here (indicating). This is another classification that I think is justified in this farm. It lays a little different. There was a grade change here. There is a drop of probably ten feet, and this I designated, I referred to it as bottom pasture. It is along the river, Snake River. It joins and is between the main farm, that is the rest of the farm and river. There is approximately a hundred acres in that area and it is divided, that is, in my opinion, this proportion here, probably 75 acres.

(Testimony of D. V. Groberg.)

and here, 25 acres or something like that, and that is my best classification——

Q. ——Let me ask, are there any springs on that?

A. Yes; there are several springs. I have been down on that several times and coming down in here (indicating) there is a beautiful spring right about at this point. And there are springs up in this area, along here, also [297] down here there is a spring and in this area there is also water, making a water supply for that area coming from the natural drainage from the irrigated lands above.

Q. Did you observe any lakes in that area in blue, and if so just locate them?

A. Yes; in this area here, and this upper portion of the pasture with the river running this way (indicating), and on the map it is at the bottom; there is a little lake which covers maybe an acre, or an acre and a half of land right in this portion here (indicating).

Q. Just by way of classification, according to the color, what else can you identify? What other types of classification did you make of the soil on this ranch? I am asking now about the classification according to topography and so on.

A. The other classification is the one noted in orange and that is on two sides of the highway here and below the purple.

Q. Can you show the number of acres in each section of the orange?

A. Yes; this is 24 acres here, that is the big field

(Testimony of D. V. Groberg.)

off the highway and it is good land. This area right here has a total acreage—I better refer to the figures on that—this total is 24 acres and that is on both sides of the highway, there is 14 acres here and with the 24, [298] there are about 47 or better in all of that, that makes a total all together of 120.8 acres.

Q. Is there any other type of classification?

A. Yes; in the red color, which is the main body of the farm. This portion right here (indicating), this is the best soil and the best land to handle. It is irrigated land and it lays well and it is in big fields and this area here is adjoining another excellent field here (indicating). That is the best soil on the ranch. It handles best and it lays in good, big fields.

Q. Mr. Groberg, how many acres did you classify in the area shown on the map in red?

A. 295 acres.

Q. And that is the areas shown in red on the map?

A. Yes.

Q. And you classify that now as to what type, that is, as to the highest or the lowest or how?

A. That is the best; that has the highest value, in my opinion, of any land on the ranch.

Q. And what factors did you take into consideration with reference to the productivity of that soil, which is classified in the area shown in red on the map?

A. I estimated the probable production in a typical and proper use of the farm. I considered its likely productivity based on the productivity of

(Testimony of D. V. Groberg.)

farms adjoining [299] it and farms that I was familiar with and farms which I had some information in regard to their productivity.

Q. What types of produce would the area shown in red be most suitable for?

A. The raising of wheat, oats, barley, alfalfa hay and seed potatoes.

Q. With reference to the seed potatoes, do you mean the entire area would be good for seed potatoes?

A. In rotation, I am of the opinion that there is an opportunity to raise portions of it in an orderly rotation of using it in its turn like we do in irrigated diversified ranches.

Q. Portions of it, in a well-balanced plan of diversified operation?

A. Yes, sir.

Q. Now, did you investigate or take into consideration what that soil would produce in bushels of grain, referring to the red now?

A. Yes, sir.

Q. And what did you determine in reference to that?

A. That it would produce 50 to 60 bushels of wheat per acre.

Q. And what production in barley?

A. More barley than that, maybe 60 to 70, or maybe 75 bushels. [300]

Q. And with reference to any other crop?

A. Oats would be about the same as barley, or more, and hay. I was there at harvest time on the adjoining properties and, in my opinion, this would

(Testimony of D. V. Groberg.)

produce two and a half ton of hay to the first cutting and two tons to the second cutting, four and a half tons of hay to the acre.

Q. Did you observe any hay on the red portion during any of the time of the appraisal?

A. No, sir.

Q. Did you observe any hay on lands adjoining the red portion, the red portion of the Ruud home ranch?

A. Yes, sir. I observed and calculated the yield of hay on the adjoining land.

Q. And did you base your estimate of the hay production on what you have seen raised in the area? A. Yes, sir.

Q. Now, can you tell the jury with reference to the factors that you have taken into consideration in reference to the productivity of the area shown in orange?

A. Yes, sir; that orange area is hard to classify, as you see, there is an area of orange right between red. One of the factors in my mind was that it was cut up a little bit more and it has got that area in green that separates it and makes more small fields. There is some mountain [301] shale in the formation of the soil. It is good soil though, in fact, I would judge that it would produce, if it was farmed the same as the other, just about as well, but it is cut up and in angles——

Q. ——Such as this area here?

A. Yes, sir; it comes to points and it is more difficult to handle and I think it is a little less pro-

(Testimony of D. V. Groberg.)

ductive because I noted a little more showing of mountain shale and some gravel, small gravel, but there is good soil, it raised good crops, but I classified it as not quite as good as the best.

Q. Did you make any examination to determine whether or not the areas shown in orange on the home ranch, Defendants' Exhibit 6, whether that had been irrigated or not? A. Yes, sir.

Q. And what did you determine?

A. It is my opinion that it all had been irrigated and it all could be irrigated.

Q. Are there any areas on the home ranch, as a result of your investigation, that you found had not been irrigated? A. Yes.

Q. And what area was that?

A. The purple area in the top section there, and the brown area on the east of the road in the bottom portion of [302] the map.

Q. This portion here (indicating)?

A. Yes.

Q. And this area here, did it show signs of having been irrigated?

A. No—well, there are ditches along in there, but that is a little high and that is where the granaries are and it would be desirable to keep it from having water on there, and I think that would be proper and so I didn't classify that as irrigated land.

Q. Did you make any investigation to determine the productivity of the area in orange?

A. Yes.

(Testimony of D. V. Groberg.)

Q. And as to what it would produce?

A. Yes.

Q. And what is your opinion with reference to that?

A. Well, in hay, it is my opinion that it would produce about the same, but in grain it was my opinion that it would produce about 10 bushels an acre less, and that was partly because of the land and partly because of the neglect that it would get because of all of the corners and the angles and the difficult manner of handling it.

Q. It would be more difficult to handle. And what, if any, valuation did you place on the land classified in the color of orange, as shown on the exhibit? [303]

A. I valued that land at \$260.00 an acre.

Q. Now, with reference to the area shown in red, and you have already testified as to its productivity, did you arrive at a valuation for that land? A. Yes, sir.

Q. What value did you arrive at for the land shown in red?

A. In my opinion that is the top land; it is the best land on the farm, and I gave that a value of \$275 an acre; that was my estimate, and that was the value I placed on that.

Q. And how many acres are there in red? That is, in the area designated as red on the map?

A. 295 acres.

Q. And how many acres are there in the area designated as orange? A. 120.8 acres.

(Testimony of D. V. Groberg.)

Q. Now, then, with reference to the area shown in blue that you have already classified, what factors did you take in connection with that 100 acres, that is, as to its highest and best use?

A. I walked over it and I viewed it. I inspected it—it's pasture, I classified that as an excellent pasture. There is water there, there is protection there, there is ample water and there are beautiful trees there, as I say there is protection. That protection is by the bluff there and [304] the beautiful trees, there is ample shade. It is a right good pasture. In my opinion it is one of the best pastures that I have ever seen. It has grass, water, shade, protection. It has a natural partition there of the river and the little elevation change. However, in my opinion, it could be used in diversified farming. It has good soil, big fields, there is water. The lake is a man-made lake. It isn't anything that would interfere at all. In my opinion it could be used for diversified farming, this 75 acres or so, or a large portion of it.

Q. Are you referring now to this area, this southern area that is shown in blue? A. Yes.

Q. Did you take that into consideration?

A. Yes, sir.

Q. And did you check with Mr. Ruud to determine whether or not any of that lower portion of the area shown in blue, this area of 75 acres, whether it had been farmed, any of it?

A. Yes, sir.

(Testimony of D. V. Groberg.)

Q. Had any of it been farmed, according to your investigation?

A. Yes; it has been farmed, and I would estimate, from my investigation, that 50 to 55 acres or so had been farmed and was adapted for diversified farming. [305]

Q. Did you exclude any of the areas on the blue section where the lakes are located in the way that you classified it as to valuing it?

A. No; I figured that the lake—it is a scenic lake, it is a very pleasant place, and in operating it as a pasture it is good and if it were operated as a diversified farm, all you would need to do is to run the water in a ditch, you wouldn't need to store it in the lake.

Q. What valuation did you place on the area in the home ranch shown on Defendants' Exhibit 6 in blue?

A. It is my opinion that the whole area of blue, together, while I am sure in my own mind that the portion in the bottom is more valuable than the portion in the top, but it all works together, and I classified it together and gave it my estimate of \$210 an acre.

Q. Now, Mr. Groberg, did you take into consideration the fences on the property?

A. Yes, sir.

Q. Will you tell the jury what you observed with reference to the fences?

A. I regarded the home ranch as being well and adequately fenced, there is some net wire, there is

(Testimony of D. V. Groberg.)

some three-barb wire and there is some two-barb wire. I regarded it as an adequate fence on the ranch.

Q. Did you place any special consideration or any special value on the fence? [306]

A. Yes, sir; in my opinion it was worth, and I figured it as being worth, somewhere in the neighborhood of three dollars a rod for the fencing, including the posts; the posts were split cedar and had to be installed, the holes dug and the posts put in and it cost something.

Q. Was that figure for the fencing straight through? A. That was for the net fencing.

Q. Did you place any special value on the other type, the barbwire? A. Yes, sir.

Q. And what valuation on a rod basis?

A. I figured about \$1.50 on the two-barb and the three-barb I figured about the same.

Q. Were there any other types of barbwire, can you show by those classifications?

A. I don't have all of my notes here, but I have the total figure, and, as I recall, there was some part where there was barb with net and some parts that had barbwire without the netting.

Q. Mr. Groberg, did you make an investigation with reference to the domestic water supply to the Ruud home ranch? A. Yes, sir.

Q. And what did you determine with reference to that?

A. The spring up to the east, in the foothills——

Q. ——In this area (indicating)? [307]

(Testimony of D. V. Groberg.)

A. Yes, sir, almost straight east from where the improvements are shown, out in that area. There is a spring that has water piped from the spring to the improvements, to the house, to the barn, to the tenant house and to the outbuildings on the farmstead.

Q. Did you make any investigation to determine whether or not the water was piped to any area in the lower pasture shown in blue?

A. Yes; there is water piped down there also from the same source.

Q. Did you discuss the piping of water to that area with Mr. Ruud? A. Yes.

Q. And to what areas has it been piped?

A. To the hospital barn down there and to the milkhouse.

Q. And did you observe whether it is a gravity flow system?

A. Yes; it comes from the higher land and comes down by gravity and there is quite a pressure at the house. I turned on a hose that watered the lawn and I turned on a second hose from another water connection and it didn't even diminish the first, it has good pressure.

Q. Did you observe whether or not they sprinkle the lawn?

A. Yes, sir; just like we do in town. It has a good pressure and you could water the garden from that hose, too, if one wished to do so. [308]

Q. Did you make any investigation to determine

(Testimony of D. V. Groberg.)

the number of feet of water pipe in connection with this domestic water supply?

A. Yes; I went to the spring and I saw the distance and I had some figures and some information on that—I knew exactly how much that was, but I don't have those exact figures here.

Q. But you did take that into consideration?

A. Yes.

Q. Did you place any special valuation on the domestic water system?

A. Yes. I estimated it and then I reflected it in the value given the buildings and improvements.

Q. Now, with reference to the buildings, did you inspect the buildings? A. Yes, sir.

Q. Will you tell the members of the jury, so that they will know, they were up there on a rather hurried trip, so just tell them briefly about the buildings and the improvements on that ranch?

A. The home is a modern home; it is located, as I pointed out, on the homestead area. It is beautifully landscaped, with evergreens, grass, flowers, and it is a modern home; it has two bedrooms, living room, dining room, kitchen, bathroom on the main floor, and a fireplace. It has [309] cabinets and closet space. There is an entranceway to the basement from the inside, from the kitchen, and there are rooms finished in the basement. There is also plumbing in the basement, laundry facilities and shower. There is drainage from the basement to a separate septic tank. Also, from the main floor, there is a stairway leading to the upstairs

(Testimony of D. V. Groberg.)

where there is some room; it isn't completely finished up there, but there is expansion room upstairs. It is faced with shakes and it is the best home in the valley. It is a delightful home.

Q. And what is the interior of the home?

A. There is some rustic, it is native, it is the kind that one would like on a ranch out that way, on a large ranch where there was livestock and a larger operation such as this. It is finished in rustic and it is well-finished, and very well maintained.

Q. And the foundation, what did you observe as to that?

A. It is a concrete foundation, the basement is concrete, the walls are concrete, it is well built, it is a good, modern home.

Q. Did you place any special value on the home?

A. Yes.

Q. What valuation did you give the home?

A. I placed the valuation which, in my opinion, was the value that it added to the ranch. I valued it at [310] \$17,500.00.

Q. Now, what other improvements in the area of the house did you observe?

A. There is a matching double garage, a two-car garage, with a shake exterior, double construction with concrete floor and concrete foundation and a shingle roof. It is 22 by 24 feet. It is a good two-car garage.

Q. And is it in good condition?

A. Yes; it is in good condition.

Q. Did you place any special valuation on it?

(Testimony of D. V. Groberg.)

A. Yes; my estimate as to the additional value it gave to the place was \$1,500.00.

Q. And what other improvements did you observe?

A. There is a tenant house that is just back and over in the farmstead lot, it has running water and it has a portion under the house that you enter from the house that has a basement area for storage. There is about 800 square feet in this house. It has a kitchen, bedroom, it is a very livable, practical type of tenant house, and my estimate of the additional value to the place because of this was \$2,500.00. I placed a value of \$2,500.00 on that.

Q. Now, just proceed to any of the other buildings that you had observed.

A. We mentioned this hospital barn; it has the water to [311] it, down over the bluff. It is a very definite asset to a cattle operation. That is a beautiful pasture there, and that, in my opinion, is the proper use for that, to have some cattle there. This hospital barn has individual partitions where cattle are placed when they are sick or nursing, or where there is reason to have cattle in, they can each be in a partitioned section. It has two floors and is 40 feet long and about 15 feet wide, and my estimate of its value was \$2,500.

Q. Did you observe the type of flooring in that building?

A. Yes; it had heavy three-inch board floor.

Q. Plank?

(Testimony of D. V. Groberg.)

A. Plank, yes; a three-inch, I believe, plank floor.

Q. Did you observe the siding?

A. Yes. It is well built; it will be there for a long time.

Q. Did you observe whether or not there were stalls, or what the division was?

A. Yes; it was really a good hospital barn for taking care of, particularly, choice livestock or livestock that needed special attention, and where each needed to have a separate stall, a place to feed and to care for them.

Q. What other improvements did you observe?

A. Well, just back of the main buildings there is a large, high barn, that, in an operation of this type—this ranch has been operated over a period of years, having horses and cows, and this particular barn is designated [312] as a stallion barn. It is well built, a good building, it is high and in construction for that purpose. I estimated it at \$1,250.00. Just at the bluff, from the house going back, there is a main barn and it has two levels at the grade change, you enter the top level from one side and from the other side you enter the bottom level, both from the ground floor, it is a two-level barn; you can put machinery in the top and machinery or stock in the bottom. You can store hay or store anything in either place. It is a substantial barn and it has a metal exterior siding, a metal roof on the east side and it has about 1,400 square feet on the two floors. I estimated it at \$2,500.00.

(Testimony of D. V. Groberg.)

Q. What type of foundation does it have?

A. It has a concrete foundation. It is well built. The next, and right over from that, is a machine shed; there are two machine shed leans on a large granary. It is granary and machine shed combination. A machine shed on either side and the main granary in the center. I discussed the capacity of this with Mr. Ruud and estimated it as having a capacity of about 5,000 bushels of grain. The sheds are good sheds. The tractors and machinery and all equipment that is used to run the farm can be stored there and serviced there, and would be out of the weather. This whole building with the two sheds on either side I estimated at \$3,500.00. [313]

Q. What type of construction is that, I mean that granary?

A. It is frame construction, good board construction.

Q. Is that two by four construction, do you know?

A. Yes; two by four, or there is some, I believe, heavier than that.

Q. Now, just proceed, Mr. Groberg.

A. There are some other small buildings there, a shop—a machine shop to repair equipment and a place to repair machinery, a place to sharpen mowers or repair wheels or axles, and such as that, and I estimated that at \$400.00. There is a chicken coop that I estimated at at a value of \$100.00. A brooder house at \$100.00. A woodshed, these are small buildings, and I estimated that also at \$100.00. There is

(Testimony of D. V. Groberg.)

a milkhouse with water to it, that is a concrete building, and I estimated that as having a value of \$240.00. A hoghouse, which I estimated at \$200.00. Then, there is a large pole corral with cutting and branding chutes, loading chutes, and it has good timber in it; it is a very necessary corral in a live-stock operation. I estimated the value of this corral at \$1,000.00. That is the buildings and improvements that I have.

Q. Now, Mr. Groberg, with reference to the metal granaries, did you observe any metal granaries?

A. Yes; they are in a different location; they are in the area of green on the map. There are twenty metal granaries [314] installed on heavy timbers and used on this farm to store grain. I investigated and talked to Mr. Ruud, and from my investigation I estimated the market value on these and the value of each of those granaries installed at \$435.00.

Q. On each of them? A. Yes.

Q. And what would that total be?

A. \$8,700.00 valuation.

Q. Did you take all of these factors into consideration in arriving at your figure of the fair market value of the Ruud home ranch?

A. Yes, sir.

Q. Did you take into consideration the location of this ranch with reference to its accessibility the year round? A. Yes, sir.

Q. And its accessibility to Idaho Falls?

(Testimony of D. V. Groberg.)

A. Yes, sir.

Q. As a result of your experience in the real estate business, do you have an opinion as to the desirability of this ranch with reference to the location?

A. Yes, sir; it would be very desirable for a comfortable place to live, a big ranch, big fields, productive soil, the location of the highway—it would be very desirable from the standpoint of interesting a purchaser who was interested in a large ranch. I don't think there would [315] be any objection to the location if they want a big ranch, if they want a big ranch they have to be out where the big ranches are.

Q. Now, with reference to this little two-acre tract (indicating), what is your opinion as to the highest and best use that could be put to?

A. The same as the other land, for raising grain and on a diversified plan, alfalfa, and possibly other diversified crops.

Mr. Holden: That's all. You may examine.

Cross-Examination

By Mr. Furey:

Q. Mr. Groberg, you placed a valuation of \$260 an acre on all that orange ground, is that correct?

A. Yes.

Q. And a valuation of \$295 an acre on all that red ground? A. \$275.00.

Q. Oh, I'm sorry. I was looking at the acreage

(Testimony of D. V. Groberg.)

here; \$275.00. Now, you didn't place \$275.00 an acre on the Alpine ground, did you? A. No, sir.

Q. That is, the fact that they are both colored red there doesn't mean that they both have the same valuation?

A. No. That's the top soil on the Alpine and this is the top on the home place. [316]

Q. And \$210.00 an acre on the blue ground?

A. Yes.

Q. Then, as I understand it, you, in addition to those valuations, also placed a valuation of \$17,500 on the house? A. Yes, sir.

Q. And the other valuations that you testified to here just now? A. Yes.

Q. And in addition to the valuation you placed on those various classifications of ground, why you also valued the fences separately?

A. Yes; I took them into consideration.

Q. That is, I understand \$3.00 a rod on some of that, and \$1.50 a rod on the two-barb wire and the three-barb wire fence?

A. Yes; I estimated that.

Q. What does your valuation figure on the total value of the fence amount to? A. \$1,974.00.

Q. Then, as I understand it, is your testimony then that that red ground there would sell on the open market, minus buildings, minus improvements, minus fences, that is, just bare ground out there in the present state of development for \$275.00 an acre? A. Yes, sir. [317]

Q. Without any improvements of any kind?

(Testimony of D. V. Groberg.)

A. Of course, it has improvements on it.

Q. As I understand it, though, you have already taken care of the improvements by the valuation you placed on them? A. Yes, sir.

Q. So, as I understand it, that ground up there, in your opinion, would sell for \$275.00 an acre on the open market last spring? A. Yes, sir.

Q. And the orange ground there would sell for \$260.00 an acre on the open market last spring?

A. Yes, sir.

Q. Without any fences, without any home, no barns, no corrals, nothing but just the bare ground?

A. They would go together, you would add the others on.

Q. But you valued them separately?

A. That's right. That's for the purpose of this, that's the way I've done it.

Q. Now, you gave some estimates here with regard to what you felt that ground would yield in various grains, hay and so forth? A. Yes.

Q. As I understand it—or I will ask you the question: Did you observe those crops? Did you make your estimates from your observation of the crops? A. On this land? [318]

Q. Yes.

A. I observed the crops that were on this land. I also observed the crops that were on the adjoining land.

Q. Did you—had you seen wheat growing on that land there? A. Some of it, yes, sir.

Q. I say on this red land here that you were

(Testimony of D. V. Groberg.)

making estimates concerning? A. No, sir.

Q. But still you were able to estimate how many bushels of wheat per acre that ground would grow without ever having seen anything on the ground?

A. I estimated it from its production in other crops, and——

Q. ——As I understand it, you have quite a lot of education and formal training as an appraiser, is that correct? A. I've had some, yes, sir.

Q. And where did you take that training?

A. In the farm training, farm appraising, at the University of Illinois.

Q. At the University of Illinois; how much time did you spend back there?

A. Well, I was there three weeks.

Q. Three weeks? A. Yes.

Q. This is the training that you took to become an M.A.I., is that right?

A. That was one of the periods; I took four different periods. [319]

Q. And during that formal education and training that you took back there, I presume that they gave you instructions on how to appraise farms and ranches?

A. The general practice of determining what the highest and best use, what the probable productivity——

Q. ——That is, they instructed you quite carefully in the technique of appraising ground, and did you have any instructions in regard to testifying in those types of cases?

(Testimony of D. V. Groberg.)

A. Mainly the information there was the methods that you use in arriving at the fair market value.

Q. Yes, and you also had some instruction on how to present these matters in court and how to testify?

A. I've read and studied some, but not in connection with that.

Q. You have had some education in regard to, and have studied up on, this business of presenting matters in court?

A. I've read some, and with counsel, I have had some information as to that.

Q. And in the course of that training, you learned how to estimate grain yields that you have never seen?

A. There was nothing in that training, my observation of those that I have seen, with my judgment, I estimate what the yields would be. In order to estimate the [320] productivity and the value I have tried to estimate what, in a highest and best operation, it would probably produce, yes, sir.

Q. In your opinion, the highest and best use of this Tract 41, home ranch, was what?

A. Diversified farming, with livestock operation.

Q. Well, now, how would you combine those two?

A. I would have a pasture area and feed the hay and the grain probably to livestock; figure out a balanced operation so that you would have the

(Testimony of D. V. Groberg.)

manure to build the soil, have the livestock to feed your crops to.

Q. And you have figured out such an operation in connection with this place?

A. I've projected a highest and best use operation. I would be that way, yes, sir.

Q. Well, now, just how much of that ground would you put into hay so that you would have hay to feed your livestock in the wintertime?

A. On a diversified basis I would estimate that about every fourth or fifth year I would change from grain to hay on the land that was diversified between hay and grain.

Q. Would you carry your cattle the year around?

A. There would be various market conditions that would change, but you would have to——

Q. I asked the question, would you carry your cattle the [321] year around?

A. I'd carry the foundation stock and the breeding stock so that I would always be in the livestock business in this type of operation.

Q. You would always have a herd of foundation stock? A. Yes.

Q. About how many cows would you have on that property there?

A. I really haven't got the exact figures. I imagine that from one to two, to maybe three hundred head.

Q. It would carry from one to two to three hundred head of cows and, as I understand it, you

(Testimony of D. V. Groberg.)

would plant grain crops there three or four years in a row, and then plant hay, is that correct?

A. That's right, and have it go for two or three or four years.

Q. I see. And then you would have grain all over that property for two or three years and then you would have hay all over that property for three or four years?

A. No; on a diversified plan you would have some land that would be in hay and some land that would be in grain.

Q. Well, as I understand it, you are going to keep up the three hundred head of cows there the year around, all the time?

A. No.

Q. Well, how many?

A. I say from one to two to three hundred. I'd have the [322] foundation stock and it is my opinion that that bottom pasture would take care of a hundred head, for instance.

Q. Well, then, how much of that—the main part of that you would keep in hay all the time?

A. No; not necessarily. I'd change from hay to grain after it had been in for—that's the way we do in diversified farming, we don't leave it in all the time. That's the way I would do here.

Q. Now, you gave some testimony, I believe, with regard to when it was first announced there was going to be a dam up there, when it was flooded.

A. Yes.

Q. And, as I understood your testimony, it was your opinion that that disrupted the farming op-

(Testimony of D. V. Groberg.)

eration, and people started operating differently from then on?

A. Well, I said that in relation to the townsite, and that's my opinion, I wasn't sure, but I remembered that that was being worked on in about '41, '42, and it was my——

Q. ——Do you know when that Alpine property was broken out of the sagebrush?

A. No; I don't for sure.

Q. You don't know that, as far as you know that it has been farmed there like that ever since before 1941?

A. It has for the past several years that I have been familiar with it. [323]

Q. Well, as I understood it, you had been familiar with that area, quite closely familiar with it, for quite a number of years?

A. The highway, I had been along the highway.

Q. But you don't know when the Alpine property was broken out of the sagebrush?

A. No; I wasn't familiar specifically with that.

Q. Do you know when those metal granaries were moved on the property?

A. I don't believe they were on in 1953, when I first went up there.

Q. They weren't on in 1953?

A. When I first went up there.

Q. They have been purchased since that time?

A. That's my opinion.

Q. Now, what kind of soil did you say there was on that Alpine property?

(Testimony of D. V. Groberg.)

A. A mountain soil. It's—there's lots of soil there, there's some rock and shale.

Q. There's a little gravel mixed in, isn't there?

A. There's some gravel there, yes, sir, but it raises uniform—I've seen it in uniform crop and that's what I said before—the grain didn't seem to notice the difference.

Q. Now, as I understand it, you say that you saw some indications of irrigation there on Tract 41-B, east [324] of the highway?

A. The red?

Q. No. Well, maybe I misunderstood you, but I thought I heard you say that you saw some indications and were of the opinion that there had been irrigation in the past on that property east of the highway on Tract 41 of the home ranch?

A. Yes; it was my impression, and I had the opinion, that that was irrigable land.

Q. What indications of irrigation did you see there?

A. The ditches were in to the farm adjoining and the water was available there.

Q. Into the farm adjoining? A. Yes.

Q. Did you see any ditches into the property there?

A. I was advised by Mr. Ruud that there was water available there, yes, sir.

Q. Then you were basing your conclusion in that respect on what Mr. Ruud told you?

A. And what I could see that it would be a simple matter to put it there, yes, sir.

(Testimony of D. V. Groberg.)

Q. You mentioned numerous times during your testimony, Mr. Groberg, that you had consulted Mr. Ruud and he told you this and he told you that; you based a large part of your conclusions on things Mr. Ruud told you, did you not? [325]

A. I tried to investigate fairly, yes, sir, the information that he could give me better than anyone else.

Q. Now, with regard to the yield that you say could be realized in wheat and oats and barley and seed potatoes, what would your estimate be on the seed potato yield on that property up there?

A. I visited and discussed and investigated with a man who had seventy acres up in that area this year and——

Q. Well, I am asking you with regard to this property here.

A. And I estimate that this would yield about the same as his, maybe a hundred and fifty to one hundred seventy-five bushel to the acre.

Q. In this diversified operation of yours, how many acres of potatoes would you plant?

A. Probably sixty to eighty acres—that's a big place there, and there would be that much adaptable.

Q. Then you would have a portion of it in grain, as I understand?

A. Yes, sir.

Q. And the balance in hay?

A. Yes, sir, and pasture.

Q. And then you would keep trading back and

(Testimony of D. V. Groberg.)

forth and that is the way you would keep your one hundred head of foundation stock taken care of?

A. That would be the typical way of doing it.

Q. How long a feeding season do they have in the wintertime [326] up in that area?

A. There's water in that bottom pasture all the time. I would judge there is three and a half to four months.

Q. About when do they have to start feeding cattle up there?

A. Feeding out of the dry feed?

Q. That's right; feeding out of the stack.

A. Oh, about, I would say in October.

Q. In October. And about what time in the spring could they start pasturing them again, what time do they stop feeding?

A. Well, I was there in June, and there was lots of feed there then. It would be some time in May that they could get pasture.

Q. What time in May would that be?

A. Maybe toward the latter part of May.

Q. And about what time in October would you start feeding?

A. See, I was there the—in October—the 7th, October the 27th, the seasons would differ, but I would say June, July, August and September pretty well would be available for——

Q. What part of the month of October would you start feeding?

A. Well, some time in the forepart of October.

(Testimony of D. V. Groberg.)

Q. The forepart. If I have counted up correctly, that would make eight months of feeding? [327]

A. Yes.

Q. You would operate a year round cattle operation there, carrying a hundred head of cows and, of course, you would have calves and the others that go with that, and raise sixty to eighty acres of potatoes each summer, and have part of it in grain, and feed that many cows for eight months every year?

A. Yes, sir. That's a big operation.

Mr. Furey: I believe that's all.

Redirect Examination

By Mr. Holden:

Q. Mr. Groberg, in arriving at your valuation of the home ranch and the Alpine ranch, did you make inquiry of people in the area, in addition to Mr. Ruud, in determining the productivity of the area?

A. Yes, sir.

Q. And the farming methods in the area?

A. Yes, sir.

Q. And you took those factors into consideration, did you, in arriving at the fair market value?

A. Yes, sir.

Q. And also did you take into consideration your experience as a real estate broker, one who has sold and handled the sale of ranches similar to this one? [328]

A. Yes, sir.

Q. In determining what it would bring on the

(Testimony of D. V. Groberg.)

open market with a willing seller and a willing buyer? A. Yes, sir.

Q. Now, with reference to your study as an appraiser, you took what was required in the way of formal training and schooling? A. Yes, sir.

Q. And this association to which you belong, how is it classified with respect to that type of professional society or organization?

A. It is the leading and the principal appraisal institute in the United States.

Q. And you took training at other times other than the three weeks which you mentioned?

A. That was specifically on farming; the other was specifically on construction and specifically on market, and such as that, yes, sir.

Q. Will you tell the jury if you have ever appeared as a witness in a condemnation suit before?

A. No, sir.

Q. And this is the first time that you have ever been a witness in court in a condemnation suit?

A. Yes, sir.

Mr. Holden: That's all. [329]

Recross-Examination

By Mr. Furey:

Q. Now, Mr. Groberg, how long has it been since you were on a farm, actively operating it?

A. Well, we own land now——

Q. ——I mean actively operating it yourself?

A. I have never actively operated, except that

(Testimony of D. V. Groberg.)

we own the livestock on one of our farms now and I actively—we own them.

Q. You never have actually engaged in farming?

A. Not since I was nineteen and I was with my folks.

Q. And you were just a young boy then?

A. I thought I was grown, but I was just nineteen.

Q. Then where did you get your experience, your training, or your ability to estimate yields of grain?

A. In conference and investigation with those who were familiar in the area and seeing their yields and judging what was equal to each other with the equal——

Q. And as I understand it from your testimony, that in that Grand Valley area up there, that they have an eight months feeding season and four months of pasture season?

A. Well, I didn't say that I got that, I just estimated from when I was there and from my best estimate.

Q. That's your best estimate that anyone running cattle [330] in that area has to dry feed them for eight months out of the year?

A. No, I wouldn't say that that's—there's early spring feed and the late feed after the fields—the fields are open there now; but I mean the actual growing pasture.

Q. Well, in this cattle operation that you had worked out and on which you based your opinion as to fair market value of the Ruud place, it was

(Testimony of D. V. Groberg.)

your opinion that there would be eight months there during which the livestock—this hundred head of livestock—and your calves and so forth, and bulls to go with them—would have to be fed? From the forepart of October to the latter part of May as I understood your testimony?

A. In our operation we send our stock out to areas of pasture that isn't this type and we have them about four months, and I estimated it from that.

Q. Well, then, you were placing your valuation on that place there, you were taking into consideration other pieces of property that aren't involved in this case?

A. No, I say that in thinking of the four months, that's what we do, we send out our stock for four months.

Mr. Furey: I believe that's all. [331]

Redirect Examination

By Mr. Holden:

Q. Mr. Groberg, do you recall actually what the length of the feeding season is up in that area?

A. No, I really haven't, other than I tried to estimate it.

Q. And you don't, right now, actually recall what it is? A. No.

Q. And it could be for a shorter period of time than that? A. Yes, sir.

Mr. Holden: That's all.

(Testimony of D. V. Groberg.)

Recross-Examination

By Mr. Furey:

Q. Well, you were guessing at it then, is that correct?

A. I was using my estimate as you asked me here then.

Q. As I understand your answer to Mr. Holden's question you were guessing at what the feeding season up there was?

A. I'll admit that my estimate may be in error, yes, sir.

Q. Have you guessed at any other things that you have testified to here?

A. Well, I have estimated my best opinion.

Q. Would you say that you made the same type of guess as to the crop yield up there in that area, considering that you haven't seen wheat growing on Mr. Ruud's ranch?

A. Well, I have seen wheat growing on some of Mr. Ruud's [332] ranch, and have seen wheat growing in the area.

Mr. Furey: That's all.

Mr. Holden: That's all.

The Court: We will adjourn at this time until 10:00 o'clock Monday morning.

November 14, 1955—10:00 o'Clock A.M.

Mr. Holden: Prior to calling our next witness, may I state that by agreement of counsel we have

stipulated as to the date when the Palisade Project was first authorized.

The Court: Very well, it may be stipulated.

Mr. Holden: The record shows, your Honor, that it was authorized on December 9, 1941, and that it was reauthorized again on September 30, 1950, they made some changes in the authorization act.

Mr. Furey: It may be so stipulated.

The Court: The record may show that it is so stipulated.

REED COOK

called as a witness by the defendant, after being first duly sworn, testifies as follows: [333]

Direct Examination

By Mr. Holden:

Q. Will you state your name?

A. Reed L. Cook.

Q. And where do you reside, Mr. Cook?

A. Idaho Falls, Idaho.

Q. How long have you lived in Idaho Falls?

A. Twelve years.

Q. Are you married? A. Yes, sir.

Q. What is your business?

A. Real estate broker.

Q. How long have you been in that business?

A. Ten years.

Q. Where have you been engaged in that business during that ten year period?

A. Primarily in the Snake River Valley, south-

(Testimony of Reed Cook.)

eastern Idaho and southwestern Montana, and the Salmon River country.

Q. Where is your main office?

A. Idaho Falls.

Q. Do you have offices in any other communities?

A. Yes, sir, at Salmon, Idaho.

Q. Do you have any associates in other areas?

A. Yes, sir, we have a working arrangement with an office in Afton, Wyoming. [334]

Q. What has been the main nature of your real estate business, have you specialized in any particular fields?

A. Yes, sir, primarily in ranches, farms and diversified farming along with dry farming.

Q. In what areas have you operated primarily?

A. In the Snake River area, Salmon River area, the Lost River area and southwestern Montana.

Q. In the course of your ten years of experience, have you become familiar with land values in Bonneville County?

A. Yes, sir.

Q. Are you familiar with farms and land values in the Swan Valley area?

A. Yes.

Q. And in the Alpine area?

A. Yes.

Q. In Grand Valley?

A. Yes, sir.

Q. Have you ever discussed farm valuations with land owners in those areas?

A. Yes.

Q. And you are familiar with the sale of properties in those areas?

A. Yes.

Q. Have you ever had occasion to make any appraisals of [335] real estate?

A. Yes.

(Testimony of Reed Cook.)

Q. Will you state briefly and generally what your experience has been?

A. My experience has mostly been with estates, I have been called to appraise for different estates. Also, when a person is considering selling property it is not uncommon to call on a real estate man to help them arrive at a fair sale price for the property to be sold.

Q. Have you made appraisals of property for the market? A. Yes, sir.

Q. State whether or not that is a part of your practice in the operation of your business?

A. Yes.

Q. You say it is?

A. It is one of the main practices in the real estate business.

Q. Did you have occasion to appraise the Bert Ruud property in Grand Valley?

A. Yes, I did.

Q. And also at Alpine? A. Yes.

Q. And also a small tract which is indicated and referred to as Tract 34, I believe two acres?

A. Yes.

Q. At whose request did you make that appraisal? [336] A. At your request.

Q. Have you any interest in any of this Ruud property? A. No, sir.

Q. Are you related to any of the parties to the suit? A. No, sir, I am not.

Q. Will you tell the jury when you first went up to make an appraisal of the Ruud property, and

(Testimony of Reed Cook.)

how many times you were on that property, or went to it?

Q. Yes, I was on there on August the 23rd, on the Ruud property, for the purpose of making an appraisal on August the 23rd, 1955, and again on October the 25th, 1955.

Q. Are you familiar with the property, and were you familiar with the Ruud property prior to August and October of this year?

A. Yes, I have observed this ranch and other ranches in the area a number of times, in passing.

Q. Will you tell the jury just what you did when you went on the Ruud property in August of 1955, to make your appraisal?

A. I went onto the property and observed the fence lines and the boundary lines. I observed the buildings and I observed the water rights, the source of the water, and the disbursement of the water on the ranch. I observed the type of soil and the topography—the type of soil mainly from the standpoint of its water holding [337] capacity and what crops it is adapted to raising.

Q. Were you able to determine the boundary lines? A. Yes.

Q. How did you determine the boundary lines?

A. I was furnished with a map similar to the one on the wall, only on a reduced size. I located the fence lines, which were very apparent from the map.

Q. And with respect to which property is that?

A. In each case, Mr. Holden.

(Testimony of Reed Cook.)

Q. Did you go onto the land itself?

A. Yes, I walked over the land and I went to the ditches and I followed the ditches through and I walked to most of the boundaries, in fact, to all of the boundaries that I could not see.

Q. Did you check with Mr. Ruud or any other parties in an effort to find out about these ranches from a history of the ranches and the productivity of them?

A. Yes, with Mr. Ruud as well as other ranchers in the area.

Q. Now, Mr. Cook, have you an opinion as a result of your checking over this ranch and talking with Mr. Ruud and others, and taking all of these matters into consideration, of the highest and best use to which the Alpine ranch could be put on or about the 4th of March, 1955? A. Yes, I do.

Q. And what is that opinion? [338]

A. In my opinion the Alpine ranch is adapted to raising small grains, such as wheat, barley and oats. Alfalfa hay and seed alfalfa, or rather alfalfa seed, and working in connection with the Bert Ruud home ranch in a livestock operation.

Q. Do you have an opinion as to the highest and best use to which the home ranch could be put on the 4th of March, 1955? A. Yes, I do.

Q. And what is that opinion?

A. In my opinion the home ranch is highly adapted to raising irrigated and non-irrigated small grains, hay and a pasture unit for a limited number of cattle in connection with the operation.

(Testimony of Reed Cook.)

Q. What did you take into consideration in arriving at the highest and best use of this property?

A. I took into consideration the possibility of diversifying the operation, and considered the manner in which a livestock operation would work in connection with that. And I also took into consideration the feasibility of raising seed potatoes in the area on a scale worked into that operation, a reasonable amount of seed potatoes.

Q. By reason of your experience in dealing with real estate and your investigation, your study and analysis of these Ruud properties here, designated as Tracts Numbers 41, 77 and 34, and bearing in mind that by fair market value [339] I mean the price in money, or money's worth, that a willing seller, willing to sell but not compelled to sell, would accept, and the amount in money or money's worth that a willing buyer, willing to buy but not compelled to buy, would pay, and considering the highest and best use to which these lands could be put on March 4, 1955, do you have an opinion as to the fair market value of the entire Ruud ownership of the home ranch, Tract Number 41, on March 4, 1955?

A. Yes, I do.

Q. And what is that opinion?

A. For the home ranch, \$206,191.00.

Q. And bearing in mind the same definition as to fair market value and all of those factors that you have taken into consideration, do you have an opinion as to the fair market value of the Alpine ranch, Tract Number 77, as of March 4, 1955?

(Testimony of Reed Cook.)

A. Yes, I do.

Q. And what is that opinion?

A. \$48,939.25.

Q. Do you have an opinion as to the fair market value of the two acre tract referred to as Tract Number 34, as of March 4, 1955?

A. Yes, I do.

Q. And what is that opinion?

A. \$330.00. [340]

Q. Do you have an opinion, bearing in mind the same definition of fair market value, of the entire Ruud ownership of those three tracts of land, in their entirety, as of March 4, 1955?

A. Yes, I do.

Q. And what is that opinion?

A. \$255,460.25.

Q. Now, Mr. Cook, can you tell the members of the jury just how you arrived at those figures, what you took into consideration and what your reasons were?

A. Yes, as to the home ranch, the colors on the map on the wall conforms with the way that I broke the land down into different classifications. Taking the breakdown on the map as it is, the land colored in red first, I termed that the best land on the ranch, due to the fact that it is irrigated, or has been, it has ditches on all of it except the portion in the upper part of the map, and it is land which can be diversified nicely, it is good mellow soil, which has in spots a slight gravel mixture, but nothing to hurt the land in farming it or in tilling it, or that

(Testimony of Reed Cook.)

would cut the production down any. That land is adapted to all of the crops that I named, such as small grains, seed potatoes and hay. Then the next land is the land colored in blue in the extreme upper end of the map, that consists of——

Q. ——Is that in purple, Mr. Cook? [341]

A. Yes, I guess that is purple.

Q. Would you care to point out just the areas you are speaking about and then you can take the witness stand again.

A. The land in purple consists of approximately 90 acres that is not irrigated nor has it been, in my observation, but I understand that there is water for it if any operator would care to put it on the land. However, it would take some work on the ditches, but any work that you do put on the ditches would enhance the value that much. The land is highly adapted to non-irrigated alfalfa in rotation with small grains, small grains being wheat, barley and oats. The land in blue is at a different level, being down near the river level. At present, this being pasture, and is very valuable as pasture land. However, there is 50 or 60 acres which could be converted to diversified farming with a little work in clearing it, and any work done to clear it and level it would enhance its value. The land in brown is this tract (indicating) of approximately ten and some odd hundredths acres in here (indicating). This is newly broken land and it has some rock, it has a problem in farming and it is not as good a

(Testimony of Reed Cook.)

land as the rest, as well as this small tract here (indicating). It has an exposure of gravel, this is actually more of a wash coming out here, that has been deposited here (indicating), [342] and the soil is not as deep and there are some rocks and gravel—

Q. What color is that?

A. Brown. Now, I will take the next here, this brown—I am sorry I was a little confused on those colors—this tract here (indicating) I believe is 6.4 acres and this one and a half acres, this is the land which has an outcropping of rock with some gravel, with some ground that would be adaptable to seed potatoes, and hay, and some grain. It would be necessary, however, to farm around these outcroppings and they could have that in hay or pasture or small grains. It could be farmed but I placed that in the lower category and then the roadway here (indicating) which I haven't placed any value on.

Q. Do you wish to return to the witness stand now? A. Yes, I might as well.

Q. Now, were there any other classifications with reference to the area in purple, which was non-irrigated, I believe you testified—how many acres were there in that classification?

A. I classified 90 acres in that classification.

Q. And with reference to the area shown in the map on orange, how many acres do you classify in that classification?

A. In that classification I have 120.8 [343] acres.

(Testimony of Reed Cook.)

Q. I don't believe that you explained that classification to the jury?

A. No, I guess I didn't, the land in that classification designated on the map, is land which can be or has been irrigated by extending the present ditches, and it is adapted to small grains and irrigated hay or non-irrigated whichever the operator might elect.

Q. How does that compare in classification with the area shown in red?

A. Very close, only that the majority of it is a little harder to work, it is a little more unhandy because it is in smaller tracts, it costs a little more to farm that type of land and there might be a slight difference in the production due to the fact that some of that land has a little gravel in it and it would take a little more water in case of irrigation, it would take about one more irrigation to produce a crop.

Q. Did you make any special valuation on the area shown in red? A. Yes, sir.

Q. And what classification and what number of acres in that classification, also what was the valuation placed on that?

A. The portion shown in red has 295 acres, and I placed a valuation of \$275.00 an acre on [344] that.

Q. And the valuation, if any, on the area shown in orange?

A. The portion shown in orange was 120.8 acres, and I placed a value of \$250.00 an acre on that.

(Testimony of Reed Cook.)

Q. And with reference to the area shown in purple, what, if any, valuation did you place on it?

A. The purple represents 90 acres and I placed a valuation of \$165.00 an acre on that.

Q. Did you make any investigation to determine the cropping practices of the 90 acres shown in purple? A. Yes, I did.

Q. And what did that reflect?

A. The information I procured from farmers who farm in that area and I also asked Mr. Ruud and they all verified that that land has been farmed every year, there has been a crop raised on it every year.

Q. And what is your opinion with respect to crop rotation on that 90 acres shown in purple?

A. In my opinion that land would be operated in the manner of two or three years in grain and the third year there would be a crop of hay seeded with the grain as a nurse crop; the third year the grain crop would not be so heavy, it would not be seeded so heavy. That would be in order to allow the hay to get a good start. [345]

Q. What acreage do you have computed in the area shown in brown? A. 38.8 acres total.

Q. Do you have a valuation on that land?

A. Yes, I placed a value of \$165 an acre on that.

Q. Now, with respect to the acreage and the valuation on the land, if you have a valuation, on the land shown in blue?

A. That represents an acreage, a total acreage of 100 acres in the two units.

(Testimony of Reed Cook.)

Q. Is that with respect to this whole area in blue here? A. Yes.

Q. Do you have a valuation on that acreage?

A. Yes, I segregated that unit into two classes of land and I evaluated the portion on the north, the upper portion, approximately 25 acres there, at \$150 an acre, and the portion on the south of 75 acres, I placed a value of \$240 an acre on that.

Q. Is that this area in here (indicating)?

A. Yes.

Q. And how much per acre was that?

A. \$240.00 per acre.

Q. Do you recall whether there was any land of other classification? A. Yes. [346]

Q. What other classification?

A. The land designated by the yellow, two small hillside pasture areas, running up here (indicating) from the irrigated bottom land.

Q. Do you know what acreage those areas constitute?

A. Yes, the yellow area represents 3.9 acres, and I placed a value on that of \$45.00 an acre.

Q. And the total value?

A. \$45.00 an acre.

Q. Do you have any other valuations on classifications of land?

A. Yes, the area represented by the color green there, 8.3 acres, I placed a value of \$25.00 an acre on that.

Q. Now, Mr. Cook, what other factors did you

(Testimony of Reed Cook.)

take into consideration in arriving at your valuation.

A. I took into consideration the irrigation on both the lower pasture land represented in blue, yes, that is blue, and on the upper land I took into consideration the location of the whole unit with regard to market, public facilities, schools and churches, and the fact that it is on an open highway the year around, and being only 55 or 60 miles from the Idaho Falls market, it is handy, considering ranches, to a market.

Q. Did you make any investigation with respect to churches and schools? [347]

A. Yes, I did.

Q. And what did you determine?

A. According to my investigation I found schools and school bus service and churches, there are a number of churches in Swan Valley and Star Valley, in those areas. Of course, the high school was at Ririe, the closest high school with the school bus service to it.

Q. Did you check as to public transportation facilities available to the area?

A. Yes, I found daily bus service and daily truck service, commercial trucking, the year around, winter and summer, with the exception of Sunday. I understand it doesn't run on Sunday.

Q. Will you tell the jury, if you can, just what you observed with reference to improvements on the home ranch?

A. I inspected the improvements on the home

(Testimony of Reed Cook.)

ranch. There is a modern home with furnace, plumbing and bath with pressure system, pressure from the springs, which is served by gravity. There is good sewage disposal. All evidence pointed to a good sewage disposal. It is a very comfortable modern home.

Q. What, if any, special valuation did you place on the home?

A. I placed a valuation on the home of \$18,000.00.

Q. What other improvements, if any, did you observe on the ranch? [348]

A. Situated next to the home is a double garage.

Q. Did you observe all of the buildings on the ranch? A. Yes.

Q. Did you go into the buildings?

A. Yes, I inspected all of the buildings.

Q. Did you observe them as to type of structure and so on? A. Yes, sir.

Q. Did you observe any other improvements on the ranch?

A. Yes, I observed the fences, I believe I have named everything now, the fences, the buildings and the ditches.

Q. And did you check into the domestic water supply? A. Yes.

Q. Now, with respect to the Alpine ranch, Tract Number 44, no, that is Tract Number 77, will you tell the jury just what factors you took into consideration in connection with the Alpine ranch in

(Testimony of Reed Cook.)

arriving at your opinion as to the highest and best use, and the fair market value?

A. I took into consideration the type of soil, the topography of the land. I took into consideration the type of crops which it should be adapted to grow in connection with the ranch and I considered the improvements, the location, and those matters.

Q. Now, will you tell the jury what, if any, factors you took into consideration with reference to the soil classification of the Alpine ranch?

A. I took into consideration the soil as to the water holding [349] types of soil, what I mean by that is that the soil is a mellow soil with some gravel mixture, but upon testing the soil, it had been considerable time since there had been a storm there in the vicinity of the ranch. There was still moisture near the surface, which indicates that the soil will produce very well with the type of precipitation that is in the area. The ranch is adapted, or rather the land is adapted, as I said before to small grains, alfalfa seed—I observed alfalfa seed on land immediately adjoining this property.

Q. How did you break that down with reference to acreage for soil classification, if any?

A. There is a total of 328.87 acres of land designated by red, which constitutes 312 acres of land, and the land designated by brown, I think it is, there is 10.2 acres.

Q. Is that the 10.2 acres here (indicating), this area in brown here? A. Yes, sir.

(Testimony of Reed Cook.)

Q. Will you describe to the jury the nature of that area?

A. The 10.2 acres represents the land which is the steeper land between the two levels. The small tract in the lower right hand corner, painted in red, is at a different level than the balance of the land, a lower level.

Q. That is this area (indicating)?

A. Yes, and the 10.2 acres is the land of what you might call with a small hill, there is a difference of [350] elevation which I would estimate about 20 or 25 feet.

Q. And this little brown area here on the map (indicating)?

A. That is a canal, that long line, or it was to be a canal at one time, it has been built and the banks are still there.

Q. These small areas in brown here, tell us about those?

A. Those small areas are outcroppings of rock, with no soil or a very little soil covering on that.

Q. Do you have a valuation of the various soil classifications on the Alpine ranch?

A. Yes, I do.

Q. Will you state to the jury just what those are?

A. The land represented in red there, consisting of 312 acres, I placed a value of \$95 an acre.

Q. Straight through?

A. Yes, \$95 an acre for the 312 acres.

Q. Now, proceed, Mr. Cook.

(Testimony of Reed Cook.)

A. The land represented in brown, 10.2 acres, I placed a value of \$15 an acre. The land represented in yellow I designated as a townsite, that is 6.5 acres.

Q. Do you know how many acres there are in the townsite, or there were at the time of your investigation?

A. It is designated, as I remember, one and a half acres.

Q. That is this area shown on Plaintiff's Exhibit 1?

A. Yes, as I understand it.

Q. Do you have an opinion as to the highest and best use [351] of that portion of the Alpine ranch that borders on the highway?

A. Yes, I do.

Q. And what is that opinion?

A. In my opinion there is a very definite value there for a townsite, in that U. S. Highway 26 and U. S. Highway 89 intersect immediately across the road from this property, and although there has been no building there in recent years, I have observed that area and there are other buildings removed from this intersection, which, in my opinion, would have been on this intersection if it had not been for the question of this land being taken at a future date.

Q. How many acres do you have in the townsite?

A. Six and a half acres, represented by yellow on the map.

Q. What, if any other factors, did you take into consideration with respect to designating six and a half acres of townsite?

(Testimony of Reed Cook.)

A. I took into consideration the location being immediately across the highway from the state line, as well as being on the intersection.

Q. What influence would that have in your opinion?

A. It has been my experience that a highway location with an intersection on a state line, as well as two main highways, has a definite value, together with the fact [352] that the highway which intersects and goes to Jackson, Wyoming, and on into Yellowstone Park has been surfaced, hard surfaced, since the time the Palisade Dam was authorized, that is according to my understanding. That has made that highway much more attractive for tourist travel.

Q. What, if any, special valuation have you placed on the townsite?

A. I placed a valuation of \$6,500.00.

Q. And that is how much per acre?

A. \$1,000.00.

Q. Did you place any valuation, any special valuation, on the improvements on the Alpine property, any of the Alpine property such as the townsite?

A. Yes, I did.

Q. Will you state to the jury what the improvement is, and just what valuation you placed on it?

A. I observed a building that is designated as the hotel building and it is being used as a hotel at the present time. It is of frame construction with seven rooms, two full baths. It is heated with butane heat and is served by a central well. I placed a valua-

(Testimony of Reed Cook.)

tion on that of \$8,500.00. There is a frame building there at present being used as a cafe, and it is served by the same central well, 513 square feet, and I placed a value of \$2,750.00 on that. There is another older building to the west and [353] the north of these buildings, and it is being used at present as a granary, and I placed a value on that of \$400.00. There is a well and pressure system and I placed a value on that of \$1,000.00.

Q. Do you know the dimensions of the hotel?

A. I don't have the dimensions, but I have the figure here of 1,349 square feet. I have that on my notes which I took.

Q. Now, Mr. Cook, do you—I think perhaps I asked about the valuation of the two acre tract.

Mr. Holden: I think you may inquire, Mr. Furey.

Cross-Examination

By Mr. Furey:

Q. Mr. Cook, how many acres—I understand that you excluded any acreage in the highway there from any consideration in arriving at a valuation?

A. Yes, sir.

Q. And how many acres are there in that highway?

A. 16.56 acres, according to my figures.

Q. Then that figure, realistically, should be subtracted from the 1,001 acres included in this condemnation?

A. That is my understanding.

(Testimony of Reed Cook.)

Q. And that will cut the actual acreage that you are valuing down to 980-odd acres, isn't that correct?

A. Approximately, I don't have it [354] exactly.

Q. You say that you have been buying and selling real estate in that area up there for some time?

A. I haven't in this immediate area, but I have been in the real estate business. I haven't known any in this area that has been for sale.

Q. But as I understand it, it is your testimony here that all of that property, that 985 acres, would sell for a little over a quarter of a million dollars last spring?

A. Yes, it would.

Q. What was the figure that you put per acre on the land in red in Tract 41?

A. \$275.00 an acre.

Q. As I understand it, that figure is excluding the improvements?

A. That includes the water and the ditches.

Q. The water and the ditches?

A. Yes, sir.

Q. How about the fencing and other improvements?

A. No, I have them separate.

Q. You gave them a separate valuation?

A. Yes.

Q. You gave them a value in addition to that property, in addition to the \$275.00 an acre?

A. Yes, sir.

Q. You figured that would be the value of the bare land [355] itself, without the improvements being figured in?

A. Yes, only including the water and the ditches.

(Testimony of Reed Cook.)

Q. As I understand your testimony, your opinion is based on a specific type of operation that you had in mind up there?

A. With variations, yes.

Q. As I understand it, you have contemplated, in arriving at your valuation, a certain type of operation that you think would be putting that ground to its highest and best possible use?

A. I considered the various types of operation that ranch is adapted for, not one specifically.

Q. Which type of an operation do you figure would make that ranch produce the most?

A. One of the most attractive operations, in my estimation, would be a nice bunch of cattle, approximately a hundred, a hundred and fifty, or possibly, two hundred, head of cattle, along with the grain and hay operations, and along with some seed potatoes.

Q. I presume with that type of an operation that ground would be producing to its fullest operation then, in your opinion?

A. Yes, I think so.

Q. In other words, its highest value could be realized out of the type of operation that you have just mentioned? [356]

A. Yes, sir.

Q. And that is the type of an operation that you base your opinion on?

A. Yes, I would say that.

Q. You say that would be a diversified operation, and then you mentioned seed potatoes, how much of that ground, under this type of operation, would you have in seed potatoes?

(Testimony of Reed Cook.)

A. In my opinion, 40 to 60 acres would be an ideal acreage of seed potatoes.

Q. You would carry that many acres of seed potatoes year after year on that ground, that is, you would try to keep that much in potatoes?

A. Yes, that would be considerably less than ten per cent of the land.

Q. That would be subtracted from that 985 acres, and that would cut it down to about 920 acres that you would have to produce feed, grain, and so forth, is that right?

A. On the basis of 60 acres it would.

Q. And then how much of that ground would you have to subtract, which would be non-productive, say the farmstead, how many acres are in the farmstead?

A. I don't know exactly in the farmstead. As I remember, it was somewhere around eight acres.

Q. Then there is some hillside there, as I understand it, some high rocky ground that would not produce, and that [357] would probably cut it down to about 900 acres that one would have to farm, is that right?

A. That would be approximately right.

Q. And as I recall, there is some hillside dropping down from that bench there, down into the pasture along the river?

A. Are you referring to the land along what we designate as the pasture?

Q. Dropping from the bench down to the pasture?

A. Yes; that constitutes some land.

(Testimony of Reed Cook.)

Q. There are ten to fifteen acres there that wouldn't produce anything, is that correct?

A. It will produce, it is used in connection with the pasture, and I think there is ten or fifteen acres in that.

Q. What would you say would be a safe estimate of actual producing ground that you would have in that place that you could depend on producing either hay or grain?

A. Well, I think the figure of 900 acres would be fairly close.

Q. And then would you have about half of that in grain, and the other in hay?

A. Well, out of that there, in a cattle operation, there would be in use the present pasture of about a hundred acres, and that would leave 800, approximately, to raise hay and grain. [358]

Q. How many acres of pasture per head would you have to have to carry cows through during the pasturing season?

A. I didn't understand that question.

Q. I say how many acres per head would you have to have to carry the cows, that is, how many acres per cow?

A. In my opinion that would pasture two head to three acres.

Q. Two head to three acres?

A. Three head to two acres, excuse me; yes, three head to two acres.

Q. And how long a pasturing season would you have?

(Testimony of Reed Cook.)

A. In that operation, in my opinion, you would pasture on that type of pasture, probably four or four and a half months.

Q. And then you would have to feed for eight months?

A. No, you would utilize the stubble land from your grain operation, together with your pasture land off from the hay land, for another month or a month and a half.

Q. When would the feeding season start there, that is, when would you start to feed dry feed out of the stack?

A. It is my opinion it would be about the middle of November to the first of December in ordinary years.

Q. The middle of November to the first of December you would start? A. Yes.

Q. And then when would you turn them back out on the pasture again? [359]

A. Approximately the middle of May, about May the 15th.

Q. Then you disagree with the testimony Mr. Groberg gave here?

A. In that sense, yes, I do.

Q. And you would carry how many head of cattle there, did you say 150?

A. 150 head would be very attractive, yes.

Q. As I understand it, you said that you understood that there was water for that portion of the land above the highway there?

A. I checked the records and I found 720 inches

(Testimony of Reed Cook.)

of water decreed to that land, which is in excess of an inch of water to the acre. An inch, in my opinion, is sufficient to irrigate an acre of land, I am referring to this land.

Q. When you say an inch to an acre of land, you have in mind an inch which is going to run all summer long, during the irrigating season?

A. Yes.

Q. And do you know whether that 720 inches is available during the irrigating season?

A. No. I understand the decree terminates approximately the middle of July, with storage water available afterwards.

Q. Then, actually, that 720 inches of decreed water isn't [360] available during the whole irrigation season?

A. No, not without storage water.

Q. You said that by putting a few ditches into that upper part, it could very easily and inexpensively be converted into irrigated ground?

A. You mean the extreme upper part there?

Q. Well, you check me and correct me if I am wrong on this, but as I understood your testimony, it was that it would be very little additional trouble and there would be very little expense involved in putting the water on that purple part, or the orange part?

A. That's right, either by lifting the water or placing a higher ditch from the source.

Q. And for that reason you gave it approximately the same value as you did that irrigated or

(Testimony of Reed Cook.)

red ground? A. Yes, \$25.00 less.

Q. And it would take very little additional effort, as you see it, to irrigate that ground up there?

A. Very little can be a far-reaching statement, but in the manner of putting water around today it would not be a great expense.

Q. And it would increase the production of that ground considerably if it were irrigated, wouldn't it?

A. On some crops it would increase the production, on other crops it would not.

Q. In other words, it is your opinion that there would be [361] an increase in the net profit to put water on that ground, which you understand is available?

A. Yes, I think it would increase the value, it would increase the production in some crops.

Q. But still that ground isn't being irrigated, is that correct? A. No, sir, it is not.

Q. Apparently Mr. Ruud didn't see fit to go ahead and pick up that additional profit that he could by putting in those ditches and so forth up there? A. Prior to the time——

Q. ——Mr. Cook, you haven't answered my question—is Mr. Ruud irrigating that ground?

A. No, sir.

Q. Now, go ahead if you have some additional answer.

A. My reason for placing my opinion as I did on the land is the difference that many lands are being put to today over what they were prior to 1950, the

(Testimony of Reed Cook.)

manner of farming today is much different than it was then.

Q. Then is it your belief that Mr. Ruud isn't putting his ground to the greatest possible use and the highest use? A. No, I don't think so.

Q. In other words, if you were operating that, you would operate it differently than Mr. Ruud?

A. Yes, I would. [362]

Q. How much experience in operating farms have you had?

A. I was raised on a farm until I was nineteen years old and I presently own two farms.

Q. Are you operating them?

A. No, I rent them.

Q. And when you were a kid your activities, I imagine, consisted of doing what your dad told you to, is that correct? A. Yes, that is about it.

Q. Probably similar to my activity?

A. Yes, probably.

Q. And you don't learn a whole lot about farming under those circumstances, do you?

A. Well, you learn quite a little bit I think.

Q. You probably would go to school in the wintertime and in the summer you would go out there and grab the business end of a pitchfork and put the hay where your father told you to, is that about it?

A. That's true, yes——

Q. ——But you don't have any actual experience in operating a farm and trying to make a profit out of it when you are a kid, or when we were?

A. No, I would say not.

(Testimony of Reed Cook.)

Q. Then, as a practical matter, you haven't had a whole lot of experience in operating farms? [363]

A. I would say no, actual participation.

Q. But still you believe that Mr. Ruud, being a man who has been in the ranching and farming business all of his life, isn't getting the greatest amount out of his farm that he could?

A. That is my opinion. May I explain that?

Q. Yes, go ahead.

A. I base my opinion on a number of ranches and farms which I have sold for people, and I observed the operation when younger blood comes into the operation of the ranch, I observed the difference.

Q. And you don't consider then that Mr. Ruud is operating his ranch as efficiently as he could, and has not during the time that you observed it?

A. Not during the time that I observed it.

Q. You were out there on two different occasions, is that correct?

A. For actual inspection purposes, yes.

Q. You were out there on August the 23rd, was it?

A. Yes, August 23rd.

Q. And then again on October 25th?

A. Yes.

Mr. Furey: That's all.

Redirect Examination

By Mr. Holden:

Q. Mr. Cook, I believe you stated that you own two ranches? [364]

A. Farms, yes.

(Testimony of Reed Cook.)

Q. And do you maintain an interest in directing the operation of those farms? A. Yes, I do.

Q. And do you go out and visit the farms?

A. Yes.

Q. And you are familiar with the farming operations there? A. Yes.

Q. And you participate in trying to handle it in the most productive manner you can?

A. Yes, that's right.

Q. Will you state what valuation you have placed on the 90 acres shown at the extreme northern portion of the map? A. \$165.00 an acre.

Q. And what valuation did you place on the portion in red? A. \$275.00 an acre.

Q. And now, did you determine the operation of the irrigation set-up on this ranch with reference to the availability of stored water?

A. Yes, I did.

Q. With whom did you check?

A. I checked with the records in the office of Lynn Crandall.

Q. Did you check with any of the water users out of Indian Creek?

A. Yes, regarding the use of the water.

Q. And you took that information into consideration in [365] arriving at your opinion?

A. Oh, yes.

Q. Now, with reference to the bottom pasture land, I believe you mentioned that as containing 100 acres. Do you know whether all of that area can be grazed? A. Yes.

(Testimony of Reed Cook.)

Q. With reference to the ten or fifteen acres, I believe you testified to on cross-examination, what did you mean with reference to the certain ten or fifteen acres down there?

A. The ten or fifteen acres which I spoke of represents the sloping land from the two elevations; between the two, there is a lot of grass on that due to the seepage from above. That area is far from wasteland, it could not be termed as wasteland.

Q. You were not referring to any of the bottom land?

A. No, sir.

Mr. Holden: That's all.

Mr. Furey: That's all.

A. W. NAEGLE

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Holden:

Q. Will you state your name, please? [366]

A. A. W. Naegle.

Q. Where do you live? A. Ucon, Idaho.

Q. Are you married? A. Yes, sir.

Q. How long have you been in Ucon?

A. A little over three years.

Q. Prior to that time where did you live?

A. Idaho Falls.

Q. And how long have you lived in Idaho Falls?

A. Since 1940.

Q. What is your business?

(Testimony of A. W. Naegle.)

A. I am a real estate broker.

Q. Do you have any other business?

A. I have my own farm. I have no other business.

Q. And do you actively supervise the operation of your farm?

A. I have it rented now, but I take a great deal of interest in it and I collaborate with the renter on the amount of acreage of each crop and so on, that is a part of our lease, that I have that privilege.

Q. And that is your practice? A. Yes.

Q. How long have you been in the real estate business? A. Four years.

Q. Prior to that time, what was your business?

A. Farm machinery business. [367]

Q. With what concern?

A. With the Westmont Tractor and Equipment Company.

Q. What was the nature of your duties with that company?

A. From 1940 until 1945 I was the manager. From 1945 until 1951 I was Sales Manager of a larger concern. The name was changed to the Pioneer Machinery Company, and it was enlarged to cover the territory from the Utah line to the Montana line.

Q. Did you have any business dealings with farmers when you were in this machinery business?

A. Yes, I would say that 85% of our business was with farmers and concerning farm machinery.

Q. Did you have occasion to go out on the farms to sell? A. Yes.

(Testimony of A. W. Naegle.)

Q. Did you have occasion to check farm operations, and also valuations in connection with this implement business?

A. Yes; one of the first things we did in the implement business was to survey the larger farms in the area, anything over 200 acres was placed on our mailing list and we made a survey of that farm and of the crops produced to see if they would be prospects for our particular type of machinery. Also, in the sale of more expensive machinery we would take a financial statement from the farmers and part of those statements were the crop acreages and the estimated yields per acre.

Q. Now, directing your attention again to the real estate [368] business, where have you been engaged in that business?

A. Headquarters at Idaho Falls.

Q. During these past years? A. Yes.

Q. In what area did you operate or do you operate primarily?

A. Largely in Bonneville County with some operations, some dealings in Bingham County and Jefferson County, out in the Mud Lake area, Swan Valley area, and Teton Basin.

Q. Are you familiar with land values in Bonneville County? A. Yes.

Q. Have you ever had occasion to check the land values and sales of land in the Swan Valley area?

A. Yes.

Q. And also in the Grand Valley area?

(Testimony of A. W. Naegle.)

A. Yes.

Q. In the Alpine area? A. Yes, sir.

Q. Have you discussed land valuations with farmers in those areas? A. Yes, I have.

Q. Are you familiar with land values in those areas? A. Yes, sir, I am.

Q. Have you ever had any appraisal experience concerning land in that area?

A. Yes, I have. My work in that particular business is [369] largely in the farm end of the business. I have a partner who specializes more in city property and I specialize in the farm end of the business. As to appraisals, I have appraised farms for insurance companies, for estates. I have been a member of the Idaho Falls Multiple Listing Board for a number of years, and a member of the appraisal committee, whose duty it is to appraise all of the property where there are requests for appraisals from the Idaho Falls Real Estate Board.

Q. Now, have you had occasion to check the productivity of land in Grand Valley and in Alpine?

A. Yes, sir.

Q. Are you familiar with the productivity of land in those areas? A. Yes, I am.

Q. Will you state to the jury whether or not you hold any office, or have held any offices in Idaho Falls, in connection with real estate operations or with real estate organizations or with other organizations?

A. Yes, I am currently the president of the Idaho Falls Real Estate Board, and the year pre-

(Testimony of A. W. Naegle.)

ceding this I was the vice-president of that Real Estate Board.

Q. Do you hold any public office at this time?

A. Yes, I am the State Senator from Bonneville County at the present time. [370]

Q. How long have you served in that office?

A. I am serving my second term, my second two years, I am elected for a two year term.

Q. Did you make an appraisal of the Bert Ruud home ranch and of the Alpine ranch and a small two-acre tract, the properties involved in this suit?

A. Yes, sir.

Q. At whose request did you do that?

A. At your request.

Q. Have you any interest in those properties?

A. No, sir.

Q. Are you related to any of the parties in this suit?

A. No, sir.

Q. Will you state to this jury when you first went on these lands to make your appraisals?

A. Yes, sir, August the 31st was the first day that I went on the land and subsequently—would you like the subsequent dates?

Q. Yes.

A. Subsequently I went back on October the 5th and October the 25th, all three times in 1955.

Q. And will you state to the jury whether or not you are familiar with land in that area, that is, in the area of these Ruud properties, and were you familiar with that area prior to the dates that you went on the properties for the purpose of making

(Testimony of A. W. Naegle.)

your appraisal? [371] A. Yes, sir.

Q. And over how long a period of time?

A. Over a period of fifteen years.

Q. Now, will you state to the jury, Mr. Naegle, just what you did when you went onto the properties, the Ruud properties, to make this appraisal?

A. Yes, sir, on August 31st, I went on the Ruud properties to make the appraisal. I took a shovel with me and I walked over practically all of the property on the home ranch, I criss-crossed and I took soil samples as well as I could for depth texture with a shovel. I am not an analyst or a scientist, but I picked up the soil, I dug into it and I noticed the moisture content, the humus, the type of soil that it was, whether or not it had gravel content, or whether it was loam soil. I walked practically all over the home ranch, and subsequently over the Alpine ranch with much the same procedure. I followed the irrigation ditches, I checked the springs and observed the water supply, the size of the ditches, their location. I inspected the buildings inside and out, and observed the construction of them. I observed the fences, the corrals, the loading chutes and the unloading chutes.

Q. Did you make any observation with respect to the location of these properties? [372]

A. Yes, the properties are very well located on an all year 'round travel main oiled highway. The properties are conveniently adjacent to stockyards at Idaho Falls and are located between the towns of the Star Valley, Afton, Etna, Thayne and those

(Testimony of A. W. Naegle.)

other Star Valley towns, and Ririe and Idaho Falls. It is rather a convenient location from a standpoint of highways.

Q. Were you able to determine the boundary lines of these properties?

A. I think pretty accurately. Mr. Ruud accompanied me the first day on the property and we went to all of the corners and sighted along all of the fence lines and observed the adjoining neighbor's property, where his property left off and the neighbor's started, and I would say that I was fairly able to locate the boundary lines.

Q. Did you have a map with you of those areas?

A. Yes, I did.

Q. Mr. Naegle, as a result of your investigation and in going over these premises, do you have an opinion as to the highest and best use to which these lands could be put, the home ranch, Tract Number 41, on March 4, 1955? A. Yes, sir.

Q. What is that opinion?

A. The use, in my opinion, the highest and best use of that [373] home ranch, approximately 671 acres, would be for a diversified cropland, consisting of alfalfa hay, wheat, oats, barley and seed potatoes. Barley with a livestock operation or a dairy operation in connection with the farming operation.

Q. Do you have an opinion as to the highest and best use to which Tract Number 77, the Alpine ranch, could be put on March 4, 1955?

A. Yes, sir

Q. And what is that opinion?

(Testimony of A. W. Naegle.)

A. My opinion is that the majority of that land is best suited for hay and grain. That is not irrigated ground. However, they produce crops each year on that ground. To diversify it between hay and grain in conjunction with the home ranch, to furnish some of the supplemental hay and grain products for the home ranch, would be the best use, with the exception of a small area designated for a townsite.

Q. Do you have an opinion as to the highest and best use of that two-acre tract, that is Tract 34?

A. Yes, that use would be the same as the area in purple surrounding it, hay, grain, alfalfa, non-irrigated crops.

Q. Now, Mr. Naegle, by reason of your experience and your dealings with real estate and your investigation, study and analysis of the Bert Ruud home ranch, Tract Number 41, [374] and bearing in mind that by fair market value I mean the price in money, or in money's worth, that a willing seller, willing but not obliged to sell, would accept, and what a willing buyer, one not obliged to buy, would pay for the Bert Ruud home ranch, and taking into consideration the highest and best use to which that property could be put, do you have an opinion as to the fair market value of the home ranch, Tract Number 41, and the entire Ruud ownership therein, on March 4, 1955? A. Yes, sir.

Q. And what is that opinion?

A. \$202,734.00.

Q. Mr. Naegle, keeping in mind the same defini-

(Testimony of A. W. Naegle.)

tion as to fair market value, do you have an opinion as to the fair market value of the Alpine ranch, taking into consideration its highest and best use, on March 4, 1955? A. Yes, sir.

Q. And what is that opinion?

A. \$49,419.00.

Q. Do you have an opinion as to the fair market value, bearing in mind the same definition, of the two-acre tract? A. Yes.

Q. And what is that opinion? A. \$350.00.

Q. Do you have an opinion as to the fair market value, taking [375] into consideration the same definition and the same factors that you did on giving the valuation of the various tracts, do you have an opinion as to the entire Ruud ownership of all of the three tracts of land? A. Yes, sir.

Q. And what is that opinion?

A. \$252,503.00.

Q. Now, Mr. Naegle, will you tell the jury just what factors you took into consideration, just how you arrived at these figures of fair market value on these properties?

A. Yes, sir, I took into consideration, primarily the quality of the land, the availability of irrigation water for the land. I think that would be my first consideration to establish values and, of course, the crops that it would raise. Secondly, I took into consideration the amount of rainfall in that area. Then I took into consideration the location and the size of the ranch, and it's my opinion that the larger sized

(Testimony of A. W. Naegle.)

ranches are becoming more valuable as economic units than the smaller sized ranch, and with the acreage of these two ranches that are located about five miles apart, makes it possible to farm a much larger area with a smaller amount of machinery than if you had this area broken up in smaller tracts, better than if you had it broken up into a good [376] many 80 or 100-acre tracts. Then, in addition, I took into consideration the protection of this Grand Valley as it is called. The home ranch is between two ranges of mountains or hills and it is rather well protected from wind or severe storms. It has the Snake River bordering it, which makes the river current available which makes it less susceptible to frost than if it didn't have the river current. I took into consideration the convenience of access to the ranch, the facilities that are there, such as the Lower Valley Power and Light Company in furnishing electricity, and the daily bus service, trucking facilities, the proximity of schools and churches and milk routes and school bus routes and things of that kind.

Q. Now, Mr. Naegle, with reference to the Alpine Ranch, did you test or examine the soil on that ranch? A. Yes, sir.

Q. Will you state to the jury with reference to the dates, if you can, just what you found with reference to the moisture content of the soil on that ranch?

A. I was first on the ranch at Alpine on August

(Testimony of A. W. Naegle.)

31st, and I believe I am correct, it is my opinion at least, that we had no rainfall for some time prior thereto. I was able at that time just by scuffing my foot, to go down to moisture at most any place on the Alpine ranch, even [377] though it is more gravelly, and in my opinion it is not as good a land, acre per acre, as the home ranch, but it seemed to have sufficient moisture in one of the months that we consider fairly dry in that area.

Q. Will you tell the jury, Mr. Naegle, just what you observed with reference to the lay of the ranch, the Alpine ranch, how does that lay?

A. The Alpine ranch lays very well, it is up on a little bench overlooking the river, with the exception of 12.2 acres that is down nearly on the river level; the rest of it is up on a bench, a little bench. It is a gradual slope, it is not flat land, there is a gradual slope but there are no steep hills or gullies, so that it would be fairly easy to farm with bigger implements. In the case of grain crops you could use big tractors, big implements, because it is fairly flat or a little sloping, it is just slightly sloping land.

Q. What did you observe with reference to the lay of the land on the home ranch?

A. The home ranch is very similar. There are gradual slopes that make for good irrigation practices. They have engineered their ditches to follow the highest elevation and in many of these places they can irrigate two or three ways from one ditch. They can do that by following the higher elevations along the land. [378]

(Testimony of A. W. Naegle.)

Q. There is a little area toward the upper end of the land designated as purple that has apparently not been irrigated. All of the orange colored land has not been—that is, the land designated in orange on the map has not been irrigated, that is, it does not appear to have been irrigated recently. However, it lays well enough so that it could have been irrigated. Property that lies alongside of it to the east, bordering it, is about the same contour as some of that land in red and some of it in orange, that is being irrigated, so that the general slope of the land is such that it certainly could be irrigated.

Q. Did you make any classifications of the soil on the home ranch? A. Yes, sir.

Q. Will you point out the various classifications, and then when you return to the stand I will ask you some questions concerning it.

Q. The first classification is the land in red. This little area in here bordering the property adjacent on the east, about 25 acres of land, and this land all in red, I classified as number one land. I classified that the number one irrigated land on the place. The land in purple is land that is every bit as good; it is marvelous soil, very little gravel, and capable of producing good crops, with a second crop of alfalfa being harvested on land adjacent to it, not irrigated. I classified that with a lower classification, [379] a little lower, because it wasn't being irrigated, but as far as the texture of the land is concerned it was equally as good as any of that in red.

(Testimony of A. W. Naegle.)

Q. Did you check to see if there was a water right for the land in purple?

A. Yes, there is a water right for the over-all land.

Q. Now, just go ahead with the soil classification.

A. The next classification I made was this classification shown here in orange. That is also land that is capable of being irrigated or is presently irrigated. This is not quite as good as the number one land but nearly so. Some of it would be hard to distinguish from the number one land. That land would have very similar characteristics. However, there is a little more gravel on this land and it doesn't lie quite as well because, in some cases, it is in pieces that would be more difficult to farm because of the sharp angles and I classified that at a little lower classification than the number one land. The next classification would be that shown in blue, the bottom pasture land, which is very good land; the lay of the land is in a fairly long, narrow strip, and it is adjacent to the river and at a different elevation. In my opinion it is being used very nearly to its highest use now. Some of it could be cropped, some of it has been cropped in the past. It would raise crops, probably [380] 40 or 50 acres of this land in this area would be just as good as this land (indicating), if it were cropped, but with an over-all picture of the land I classified it as pasture land, the use that it is now being put to. It has a series of

(Testimony of A. W. Naegle.)

springs, lakes, and ample water. It has protection from the trees along the river bank——

Q. ——Where is the river bank, can you indicate that?

A. Yes, the river bank is right along here (indicating). This is the Snake River course right here along the property. I classified that in a separate classification. Then the little area in brown down here (indicating), some of which was in wheat this year for the first time, having been broken out of sagebrush, some of it is a little bit more gravelly than some of the other and I classified about 38 acres, this part here, and this, there is about 10 acres in here along the roadway as you come into the homestead. This has a little lower classification than the land which is shown in orange. Then I classed the 2.5 acres in yellow as hillside and the 1.4 as hillside there (indicating). That I classified as grazing land because it is not available for cultivation; it is hillside ground and I thought that its highest and best use would be for grazing, for that small area. There is a little area in here, about five acres, with a half acre here and six-tenths of an acre [381] here, and one and two-tenths acres here that is rocky and not too well situated for tillage. I classified that separately, and I put a classification of grazing on that as its highest and best use.

Q. Now, Mr. Naegle, did you place any valuation on these various soil classifications that you have just testified to? A. Yes.

Q. Will you state to the jury the acreage in the

(Testimony of A. W. Naegle.)

various classifications and what, if any, valuation you gave the various classifications?

A. Yes, on the red, on the home ranch, the number one land, the irrigated land, I classified that and valued it. There were 295 acres and I valued it at \$280 per acre. On the orange, the second classification, nearly as good as the red but not quite, still irrigated ground, I valued 120.8 acres at \$250 per acre. On blue designated land, the bottom pasture land, approximately 100 acres, I valued at \$200 an acre. On the purple at the extreme north of the map, the upper portion of the map, 90 acres, I valued it at \$175 per acre. On the brown, the part down near the bottom of the map, the little 10 acres up here near where the road goes into the farm, 38.8 acres, I valued at \$175 per acre. That is irrigated ground, not quite as good a ground as the [382] purple, and yet the fact that it has water for it would make it produce very nearly as well. On the yellow portion, the little portion of hillside ground at the extreme top, and near the extreme bottom, 3.9 acres total, I classified as grazing ground at \$20 an acre. The green area, which has some rock on it, rock outcropping, and some of it is not now farmed. They are farming around it, the 8.3 acres I valued that at \$20 an acre and it is classified as grazing ground. The difference, 16.5 acres of roadway, which has already been taken for the roadway, but which would come out of the ranch and which I understand enters into this case inasmuch that if the roadway was ever

(Testimony of A. W. Naegle.)

changed it would revert to the owner. I placed no money value on that roadway or on that area.

Q. Now, Mr. Naegle, will you state to the jury what you observed with reference to the improvements on this property?

A. Yes. I noticed a very up-to-date modern ranch home, very well constructed. It is quite a picturesque and very commodious ranch home with a large living room, with a beautiful stone fireplace. It looks like it was built out of the smoothest stone that a person could gather down on the Snake River. They are all very round and very smooth stones of uniform size. The stone fireplace goes clear up to the ceiling in the living room. There [383] is a large dining room, a kitchen, and utility room, two bedrooms, bath, full basement with modern furnace, and an upstairs that is floored but not finished, with plenty of additional room for two bedrooms upstairs. It is all very well insulated, of rustic construction with varnish or shellacked interior logs, and the outside is covered with asphalt type shingles covered over the logs on the outside. It has a metal roof. The attic floor above the ceiling is all well insulated. The garage is a two-car garage——

Q. ——What valuation did you place on the home? A. \$18,000.00.

Q. Now, go ahead, Mr. Naegle?

A. The garage is a two-car garage, matching construction with the house; there is a tenant house and a hospital barn down in the lower part of the pasture——

(Testimony of A. W. Naegle.)

Q. —What special valuation, if any, did you place on the hospital barn?

A. On the hospital barn I placed a valuation of \$2,500.

Q. What type of construction is that?

A. That is double plank construction, double floor and double sides. It is very, very well constructed, and partitioned off with individual stalls inside.

Q. And what valuation, if any, did you place on the tenant house?

A. On the tenant house I placed \$2,500.00. [384]

Q. What other improvements were there?

A. The stallion barn I valued at \$1,000. There was a very large barn on the banks of the ground that slopes down to the pasture, which can be approached from either elevation. It is open at both ends and the loft or part above can be approached from another elevation and that can be used for storage of hay or machinery. I observed that it had a cement foundation, and at one time has been used as a dairy barn. This lower pasture used as a dairy and there is a cement milkhouse——

Q. —What valuation, if any, did you place on the big barn?

A. On the big barn I placed a valuation of \$2,500.00. It is an older barn, but it is all metal covered on the north side.

Q. With reference to the granary?

A. There is a very well built two by four granary, that is, two by fours laid one on top of another.

(Testimony of A. W. Naegle.)

Q. How do you mean with reference to one laid on top of the other?

A. Well, there is one two by four laid on top of another. All of the sides are built that way, the sides of that granary are built out of two-by-four construction so that the full thickness of the two-by-four is the thickness of the wall. It is a very well built granary and has machine sheds on each side, lean-tos attached to the granary, and [385] I placed a value on that granary of \$3,500.00.

Q. Was that for the entire building?

A. That is correct, including the lean-to machine sheds. There is a shop building, a blacksmith shop, that is an older building and not in too good a state of repair, but it is an adequate building to be used. It is much older, and I placed a value on that of \$200. There is a chicken coop on which I placed a value of \$100.

Q. What type of building is that?

A. That is a frame building. There is a brooder house, the same type of construction, on which I placed a value of \$100.00.

Q. Did you take into consideration the domestic water supply?

A. Yes, I did. The domestic water supply is valuable to the property. It is piped down from the mountain springs, I believe about three and a half or four miles up the mountain, bringing a very fine quality of mountain water down to the house and the buildings, and it is even piped down to the lower pasture so that it can be piped and is piped to the

(Testimony of A. W. Naegle.)

hospital barn and other buildings as they have them down there. They have a complete network of water system with water piped into the corrals and the tenant house and the big barn and [386] other buildings.

Q. Is it a gravity flow system?

A. Yes, it is.

Q. What did you observe with reference to the pressure?

A. Well, at the time I was there on one of my trips, they had two hoses going outside of the house on some of the lawn, and there seemed to be a very complete pressure for the two lines going at the same time. That is about the only way I had to check the pressure. I think it was adequate. I think from the contour of the ground, in fact, I am sure, that coming from the higher elevation above, the pressure would be adequate.

Q. Did you observe any springs on the home ranch? A. Yes, sir.

Q. Will you tell the jury just what you observed concerning the springs?

A. There is a whole series of springs on that section marked 13 in that lower blue there, in the pasture land down there between the river there, that whole section. There is a series of eight or ten springs. Yes, I would say eight or ten springs with a very nice flow of water coming out of those springs. Some of them toward the very lower end of the pasture have been diverted into a man-made reservoir or pond, where the waters are stored, and

(Testimony of A. W. Naegle.)

it makes a very nice duck pond or fishing pond. It could be [387] used for irrigation purposes if water was ever short, but there is enough run-off from those streams to keep that whole bottom pasture very well irrigated.

Q. With reference to the valuation and the classification of the land, did you discuss this with any other parties?

A. Yes, I did. The first time I went on the property, which was on August 31st, I went in company with two other appraisers. We took the map and more or less discussed the land, and finally came to pretty much of an agreement on the division of the land as far as number one, number two, number three, and so on, was concerned.

Q. And was that discussed with Mr. Christensen?

A. Yes, it was.

Q. Mr. Christensen, the engineer?

A. Yes, sir.

Q. Now, with reference to the Alpine ranch, Mr. Naegle, state to the jury, what, if any classifications you have of the soil on that ranch.

A. There is a difference in the soil, of course; some of it is better than others on the Alpine ranch, but after looking it over pretty carefully I didn't think that there would be any good purpose served by breaking it down into too many classifications. The land toward the upper portion——

Q. ——What do you mean by the upper portion, this area that [388] I am pointing to?

A. Yes, that area there, about 80 acres up in that

(Testimony of A. W. Naegle.)

section, is probably better land than the 80 immediately south of it, but I classified all of that land in the red area into one classification and put an average price on it for the whole area.

Q. And how many acres were there in that classification? A. 312.17.

Q. And what, if any, valuation did you place on that?

A. I placed a one hundred dollar per acre value on that. By that I mean 312.17 acres.

Q. And what, if any, other classifications were there?

A. The only other classification is the little area called the bluff, the little ridge area between the two elevations.

Q. And what color is that?

A. That is in brown, I believe, as near as I can tell. That area has a few outcroppings where there is a little heavy gravel, and I classified that total of 10.2 acres as grazing ground and I gave it a nominal value of \$10 per acre. The other classification, the third is townsite, and that I classified 6.5 acres, and I classified it as townsite with a possible growth for future townsite land, and suitable for future growth and development and six and a half acres of that I valued at \$1,000 per acre [389] for a total of \$6,500.00. That was for the townsite area in yellow.

Q. And what factors did you take into consideration in reference to the townsite area, just tell us.

A. Well, I took into consideration the property being located right on the junction of two main

(Testimony of A. W. Naegle.)

traveled highways, U. S. Highway Number 89 and Number 26. The highway running right along the state line, with Wyoming on one side and Idaho on the other. The fact that Wyoming has a sales tax and Idaho does not, makes it advantageous for some Wyoming people to trade in Idaho if they can save the sales tax by going across the street. It lends itself to encouraging merchants. The tourist traffic in this area is becoming terrific. We, in Idaho Falls—I have been a member of the Idaho Falls Chamber of Commerce for a number of years, and we have been very much disturbed about the terrific highway travel that goes up through from Salt Lake, through Logan Canyon and Star Valley and on up through Jackson to the Yellowstone Park area rather than coming up our way through Idaho Falls. I am not familiar with the statistics. We have made traffic counts up there in the summer, and know that the traffic is terrific, and with this area designated as a townsite, with that amount of traffic, there is all kinds of possibilities for growth and development of a townsite. I also took into [390] consideration the fact that some of the property in this area has been sold for business purposes, and from the amount that they have received for building sites in the area I felt that \$1,000 per acre would be a reasonable amount for 6.5 acres as a townsite.

Q. Where does this 6.5 acres lay with reference to the highways?

A. It is right on the highway. The two highways join right in front of this 6.5 acres. They come to-

(Testimony of A. W. Naegle.)

gether, the junction of the highways is right in front of this townsite area designated in yellow.

Q. Did you observe any improvements on the Alpine property? A. Yes, sir.

Q. Will you state what improvements you observed, if any?

A. The improvements on the Ruud property consisted of a small hotel building, seven rooms with two sets of bathrooms. It is butane heated with running water. It is modern, and that I valued at \$8,000.00. The other is a cafe building, currently being used as a cafe, and in times past I believe it has been used as a grocery store, and may still have some use as more than a cafe. It has a kitchen joining the main part of the cafe, and has a storage room behind that. It has running water from a well on the Ruud property, and I valued that at \$2,500.00. There is a little granary or storage shed on the property. [391] It is old and not of too much value. I valued that at \$100. I valued the well and the pressure system at \$1,000.00. I understand that in addition to serving the buildings on Mr. Ruud's property, some of the neighbors across the street also get their water from that well and pressure system. I think it is the only well right there.

Mr. Holden: I believe that's all, and you may examine, Mr. Furey.

The Court: We will take a recess at this time for fifteen minutes.

(Testimony of A. W. Naegle.)

November 14, 1955—3:15 o'Clock P.M.

Cross-Examination

By Mr. Furey:

Q. Mr. Naegle, did I understand you to say that as far as you could see, none of the purple ground or orange east of the highway on Tract 44, had been irrigated recently?

A. No. If I gave that impression it was the wrong impression. That is true as to the purple, but as to the orange, some of it has been irrigated. There is a roadway which runs across the highway, and some of the orange down toward the point of that red, has been irrigated recently.

Q. Just about how much of it?

A. Well, I did kind of follow the ditch lines, but I didn't [392] make any estimate as to how much, because I saw that the property right adjacent to it had been irrigated for the full length of it, and it looked to me like a road on the east side of that fence, in fact, I think Mr. Ruud has a ditch that runs up into that property next to him. I may be wrong on that, it may be on his own property, but I think his ditch parallels the neighbor's ditch that he hasn't used recently, but it has been used to irrigate most of the orange area. I think it has all been irrigated.

Q. In the last year or two?

A. No, I wouldn't say in the last year or two.

Q. In the last four or five years?

(Testimony of A. W. Naegle.)

A. No, I would think not, but in the last ten years, yes.

Q. You think about ten years ago it was irrigated?

A. I would say within the last ten years. I wouldn't attempt to say exactly when.

Q. But not recently? A. That is correct.

Q. Am I correct in saying that it is your testimony that none of that indicated in purple, nor any of the orange, has been irrigated within the last four or five years?

A. No; that would not be correct. Some of the orange down on this point has been irrigated recently.

Q. I misunderstood you. Will you step to the map and show [393] me which point you are talking about?

A. This portion has been irrigated recently.

Q. How recently?

A. I should say within the last two or three years.

Q. Would you say it has been irrigated this past year? A. No, I don't think so.

Q. Would you say the year before this past year?

A. I would say within three or four years.

Q. And as I understood it, you based your valuation of value on the conclusion that there was water for the whole property except for some, I believe, down in the bottom?

A. There is a decreed water right for the whole

(Testimony of A. W. Naegle.)

property, but I didn't base my appraisal on irrigating the upper 90 acres.

Q. Maybe I misunderstood you, Mr. Naegle. I thought you testified to the effect that you valued that orange and purple ground there almost as high as the red ground, on the theory that there was water available for that, and that it could be irrigated if Mr. Ruud wanted to do so?

A. I didn't intend to convey the idea that I would intend to irrigate the purple ground. There is water for it, but it produces very well without water, and my appraisal of that purple ground did not contemplate irrigation.

Q. In other words, you think that ground will produce just [394] as much without irrigation as it would with irrigation?

A. Nearly as much.

Q. How nearly?

A. Well, I think the additional labor that it would take to irrigate it would offset the additional production; I think it is just as economic to farm it without water, with the rainfall they have there, as it would be if it irrigate it.

Q. And you were out there when?

A. August the 31st.

Q. Had the crops been harvested at that time?

A. They were starting to harvest the crops at that time.

Q. You could see the crops? A. Yes, sir.

Q. Did you compare the crops in that purple area with the crops down here in the red area?

(Testimony of A. W. Naegle.)

A. I think the purple area had all been harvested when I got there.

Q. Then you were not in a position to see whether there would have been less on the purple area than on the red area?

A. I think you can tell pretty well by the stubble ground, by comparing the stubble ground of the two parts as to the production. I think probably the red would have produced a little more than the purple ground. [395]

Q. Now, Mr. Naegle, is it your testimony that all of the orange area, during this past year, could have been irrigated, is that correct?

A. Yes, sir.

Q. And is it your testimony that if it were irrigated it would produce more than without irrigation?

A. Yes, sir.

Q. Would that be enough more to make it worthwhile to put water on there?

A. That would depend somewhat on the crop. In my judgment it would make it worth more, yes, sir.

Q. In other words, as you see it, Mr. Ruud was wasting some possible source of profit there?

A. I don't think that Mr. Ruud produced the best crop that he could have produced.

Q. And there was water there and he could have put it on if he wanted to?

A. Yes, sir.

Q. And you have examined the records with regard to his water right?

A. Yes, sir.

Q. And I think that it is agreed by everyone

(Testimony of A. W. Naegle.)

that he has a decreed water right to about 720 inches? A. That is correct.

Q. And I think it is understood by everyone that that water [396] right is usually cut off about the 15th of July every year?

A. I think that is a fair statement.

Q. And, as I understand it, he has access to stored water that he can buy so long as there is water in Indian Creek? A. That is right.

Q. Did you examine the records to see whether Mr. Ruud had purchased any water within the past few years? A. Yes, sir.

Q. Had he?

A. No, sir; I think not since 1949.

Q. The purchase price of that water is rather nominal, as I understand it?

A. Very nominal.

Q. And it is your opinion that you would have farmed that property differently than Mr. Ruud did? A. Yes, sir.

Q. Now, what crops did he have that Tract 41 in during this past year?

A. Is Tract 41 the home ranch?

Q. The home ranch, yes.

A. Practically all of it was in barley.

Q. And the same is true of the Alpine ranch?

A. Yes, sir. [397]

Q. And, as I understand it, you would plant different crops, you would have seed potatoes there?

A. Yes, sir.

Q. And you would have livestock on the place?

(Testimony of A. W. Naegle.)

A. Yes, sir.

Q. In other words, you think Mr. Ruud is making a mistake and wasting the ground to some extent by farming it in the manner that he was farming it the past few years?

A. I am reluctant to criticize Mr. Ruud, but my observation of other farms that we have handled leads me to think that, and, in fact, I am sure, that this farm could be put to a higher use than it has been for the last few years.

Q. You own a farm now? A. Yes, sir.

Q. How long have you owned that farm?

A. For the past five years.

Q. And prior to that, what farming experience had you had?

A. I grew up on a farm. I worked in the summertime in the Teton Basin on land similar to this where I helped raise seed potatoes.

Q. You grew up on a farm to what age?

A. To about fifteen.

Q. And then you left, I presume, and what did you do after that?

A. After that time I went to school and worked on farms [398] in the summertime, and for three years I worked on farms in the Teton Basin at similar elevations to this farm where they raised similar crops, for the San Diego Fruit and Produce Company, who raised among other things, seed potatoes. I had the job of helping raise those seed potatoes.

Q. You were working for wages then?

(Testimony of A. W. Naegle.)

A. Yes, sir.

Q. And how long did you work for this farm machinery company? A. For eleven years.

Q. And prior to the time that you worked for them, what was your business?

A. I was in the oil business.

Q. Where was that?

A. Spokane, Washington.

Q. How long were you in the oil business?

A. About seven years.

Q. And prior to that?

A. I was in college and worked on farms in the summertime.

Q. Now, in connection with your surveys of property while you were in the farm machinery business, I believe that you stated that you had occasion to learn values because you took financial statements from farmers when you were in that business? A. Yes, sir. [399]

Q. Those were their figures, that is, that was their own estimate of the values?

A. That is correct.

Q. I believe you said that you were on that property on August 31st? A. Yes, sir.

Q. And on October the 5th?

A. That's correct.

Q. And on October the 25th? A. Yes, sir.

Q. And all of the crops, of course, were harvested by October the 5th? A. Yes, sir.

Q. And they were started on the harvesting, and

(Testimony of A. W. Naegle.)

had harvested part of them when you were there on August the 31st?

A. That is right. I would like to qualify that answer that I made to the question just preceding. I think that they were all harvested on the 5th. I didn't make particular note of it.

Q. Oh, I didn't mean to hold you down to that specific date, Mr. Naegle, but a substantial part were harvested at that time? A. Yes, sir.

Q. On the basis of your experience in observing farms while [400] you were selling farm machinery and you say that was your main purpose in going out to the farms during that time was to sell tractors and farm machinery, is that right?

A. That is correct.

Q. And on the basis of that experience and the experience of your real estate business for the past four or five years, and those three visits, you concluded that if you were operating that farm you would change the method substantially from the way Mr. Ruud was operating it? A. Yes, sir.

Q. And there are about 985 acres of land altogether that your valuation runs to, your total valuation?

A. That is approximately correct, plus the 16 acres for the highway.

Q. And you feel in your mind that last spring, on March the 4th, I mean March 4th, 1955, that 985 acres would have, and could have been bought and sold on the open market, that is, not taking into consideration any sentimental value or anything of

(Testimony of A. W. Naegle.)

that nature, that property would have bought and sold for over a quarter of a million dollars?

A. Yes, sir.

Mr. Furey: That's all. [401]

Redirect Examination

By Mr. Holden:

Q. Mr. Naegle, are you and have you been familiar with the lands in the Grand Valley?

The Court: I think he answered that, Mr. Holden.

Q. Prior to the time of this appraisal?

The Court: I believe he answered that also; said that he was.

Mr. Holden: Very well.

Recross-Examination

By Mr. Furey:

Q. Mr. Naegle, you stated that you were State Senator. Will you explain how your occupation, that is, in that position, how that helped you to appraise this farm land up there?

A. I don't think that had any value in connection with the appraisal of this farm.

Q. You don't think that your occupying that position helped? A. No.

Mr. Furey: That's all.

Mr. Holden: That's all.

BERT RUUD

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Holden:

Q. Will you state your name, please? [402]

A. Bert Ruud.

Q. What is your age? A. Sixty-seven.

Q. Where do you live, Mr. Ruud?

A. Grand Valley.

Q. On what property?

A. On the property in question, known as the Bert Ruud farm.

Q. The home ranch? A. Yes, sir.

Q. How many acres are in the home ranch?

A. Approximately 671 acres.

Q. Are you married? A. Yes, sir.

Q. How long have you lived on the home ranch?

A. Just about thirty-nine years.

Q. When did you acquire ownership of the home ranch? A. 1917.

Q. When did you acquire ownership of the Alpine ranch?

A. Part of it in 1918. I leased the rest of it during all of the time that I have been there, but I got possession of part of it in 1930, I think it was.

Q. And you have owned these properties since that time? A. Yes, sir.

Q. With respect to the two-acre tract, that is, Tract Number 34 of the northern portion of your

(Testimony of Bert Ruud.)

ranch, will you state [403] when you acquired that land?

A. That land was just mentioned in a deed when it was transferred to me as a school lot. It was deeded to the school as long as the school was there and that is the way it read.

Q. Who has possession of that land?

A. Well, since the school has left we have had possession.

Q. How long has that been?

A. I think about fifteen years.

Q. How is that land operated?

A. We just operated it along with the rest of the land.

Q. Now, Mr. Ruud, who has paid the taxes on that land, on that tract, during that time?

Mr. Furey: I have no argument with Mr. Ruud over that tract. I don't want it suggested here that the plaintiff is contesting this matter with Mr. Ruud as to the ownership of this two-acre tract.

The Court: That is the way I understood it. You may go ahead.

Mr. Holden: I just wanted to ask him that question.

The Court: Very well, go ahead.

A. As far as I know, I have. I don't think it has ever been deducted from the area in question.

Q. Now, Mr. Ruud, tell the jury just how the water is used [404] in the irrigation of the home ranch. Just tell the jury what the practice is with reference to the irrigating of that ranch?

(Testimony of Bert Ruud.)

A. We have a large canal that takes out of Indian Creek. We have access to as much water as we think we need and in years when we need a lot of water we fill our ditches up to capacity up until about the first of July and all of our lands are soaked up and we don't have much use for any water after that.

Q. Do you know when the decreed water right is cut on the home ranch?

A. No; we never know when it's cut.

Q. Do you know how many inches of decreed water you have? A. 720.

Q. 720 inches? A. Yes.

Q. Of what water?

A. Out of Indian Creek.

Q. Have you ever been notified when the decree is cut? A. No, sir.

Q. After the middle of July, will you tell the jury what the practice is with reference to the use of water of Indian Creek?

A. Some time after July that water may taper off a little bit at the head of our ditch, but that is very seldom. [405] If it does then we rotate the water with our neighbors. We may have a small area and they may have a small area that needs water, and we rotate it from one ditch to the other. Our ditches out of Indian Creek are so that we can throw our ditch into their's and their ditch into ours, and we use it that way if necessary.

Q. Is there any water available to your land after your decree is cut? A. Yes, sir.

(Testimony of Bert Ruud.)

Q. Will you state to the jury just what it is?

A. It is the water that is running in Indian Creek and we just go up and use what we want, and at the end of the season the watermaster just bills us a nominal charge, and we just pay it. It is very nominal. We never know when it's cut, we always use it and we have always had what we wanted, or what we needed.

Q. And what has been that charge?

A. The charge has averaged from about fifteen to twenty-five dollars per year.

Q. For how many years has this practice continued? A. Oh, for the last 35 years.

Q. How long has that continued with reference to the length of time you have been on the ranch?

A. Ever since I have been on the ranch.

Q. Now, Mr. Ruud, can you tell the jury, if you know, what [406] waters you have used during the month of August since you have been on that ranch, how many inches of water?

A. Very little after the middle of July, after that in that country we irrigate but very little. Like I told you before, we may have a little spot of ground that has a small amount of gravel on, and we might take a small stream of gravel down there to irrigate with. There has been a year or two when this water got quite low and then Mr. Smith and Mr. Honen and myself would just get together and bunch this water together and rotate it, and use it for a day or two each. We would use it just to cover this area and then after that time we would just

(Testimony of Bert Ruud.)

turn the water to the river. The water keeps coming down the ditch but we don't use it. I have a place on my farm to turn it to the river. If we have some livestock on the farm they have access to this water, it runs down the middle of the farm and it is a little easier for them to get to the ditch than it is to go to the river or the springs.

Q. Just tell the jury what you know about the flow of water in Indian Creek during the month of August, that is, as to the amount of water?

A. To my recollection, outside of about two years, we have had five or six or eight hundred and maybe a thousand inches of water there that we could get when we needed it. [407]

Q. And you have used it during the times that you wanted it? A. Yes, sir.

Q. Now, Mr. Ruud, while we are on this question of water, will you tell the jury just what areas of the home ranch are irrigated, or have been irrigated?

A. We have irrigated all of it except that part shown in purple that you have been explaining here with the different witnesses. We could have watered that, but it is very good land and so we never went to the trouble of taking a high ditch. We started once and had got the ditch high enough to water that, the water would go that far, but it is a wonderful piece of land and it don't require much water. We grow good crops on it without water, and for the extra expense—there is quite a little raise on that piece of land down to the other, and then there

(Testimony of Bert Ruud.)

is a little swale in between and that fills up with water, and should we ever want to, we could just put a pump in that little swale and pump it up to the other. But even at that, it wouldn't pay us.

Q. You are referring to the area in purple now, Mr. Ruud? A. Yes, sir.

Q. 90 acres there, I believe? A. Yes, sir.

Q. Now, what has been the practice during the past three or four or five years with reference to the irrigation of [408] the home ranch?

A. The last three or four or five years I have leased that land out to different parties. I did that because of the labor shortage, and they have put it in, mostly to barley, and some of them have tried to irrigate and really it is a hindrance to irrigate that barley; it knocks it down and makes a second growth in it, and I have gone out there and I have told them that they should irrigate it and I have watched them, and after the irrigation it seems to be a hindrance and so I have agreed with them that maybe they shouldn't water it, and the last five or six years, most of that land that is in question has been handled that way.

Q. Now, what do you mean by the land in question?

A. The land in question where the ditches have been plowed out.

Q. And what land is that?

A. That's the land down there in yellow.

Q. Will you point it out on the map?

A. Yes; this land here (indicating). When this

(Testimony of Bert Ruud.)

highway came in this was all in one field. When this highway came in it cut it in two, and after the highway came we changed these ditches and we didn't irrigate as extensively as we did before. Since these boys have been irrigating this a lot of the ditches are hard to find [409] except along the ridge here.

Q. You say since they have been irrigating, what do you mean? A. Since I have leased it.

Q. Now, will you state to the jury whether or not the area you have just designated has ever been irrigated?

A. Yes; that land has been irrigated a lot when I ran it.

Q. Now, with respect to the rest of the ranch, will you tell the jury what the practice is in reference to irrigation?

A. It is just the same way, none of this has been irrigated during the last two or three years. It cannot be irrigated with the kind of crops they are growing, it is a detriment to irrigate it.

Q. What, with respect to any other areas on the ranch, the southern area, the bottom of the map?

A. It has been about the same, we had another ditch here, but with making this new highway—the first ditch we had on the ranch came this way (indicating).

Q. Across what color?

A. On the brown and down into this orange.

Q. And what location on the map is that?

A. The southern part of the map.

(Testimony of Bert Ruud.)

Q. And has that area in brown and organge on the southern part of the map ever been irrigated?

A. Yes, sir. [410]

Q. Now, then, will you state to the jury how you get the water onto your ranch?

A. Indian Creek comes down here like this. I am tracing it down here; it comes down here and we have, up about three and a half miles, a canal, a large canal that comes down across here (indicating). It makes a circle right along here and comes on my land right in here, and then we have a big divider right here that divides three ways, and we get water out of this ditch. There are times when we do irrigate and we use approximately 3,000 inches, when we arrigate we use to capacity here for hay and pasture and stuff in the spring of the year. We might start there and fill our ditches and use two or three thousand inches of water. These are the main ditches here shown on the map. Then we had ditches running this way and this way and when we wanted to we would turn out this whole stream here (indicating).

Q. What types of crops did you raise when you irrigated that area?

A. We raised various types of hay and small grain, and we kept a lot of it in different kinds of grasses, there is a grass now that takes the place of alfalfa.

Q. Now, just another minute, Mr. Ruud, while you are at the map there, how did you get the water by the highway?

(Testimony of Bert Ruud.)

A. When this highway was put in it rather inconvenienced the [411] amount of flow that we could get across here. They lowered this highway and this ditch is surveyed on a sort of high line clear through the whole ranch, down like this, and it carries an awful lot of water. In making this highway, after the engineers had finished it, they found that we couldn't get all of the water in this canal through this and so they put in three culverts instead of the one; there is a culvert here and a culvert here, so we could pull it across and back to here (indicating).

Q. And what type of culverts are they?

A. They are steel culverts with concrete heads.

Q. Now, how many culverts, if you know, do you have that cross under that highway? Just point them out on the map so the jury will know, just show them where you bring the water onto the ranch.

A. There is a big culvert here; there was one here but we allowed the Highway Department to take that out; that was about four years ago and we were not irrigating this too much and we allowed them to take it out, and they said if we wanted it back in they would put it back in at any time. They lowered this in here quite a bit so they would have to make a dike to put that water through, but we thought that would be about our last year, and so we allowed them to put that in.

Q. But there was one in there before? [412]

A. Yes; that is the first ditch on the ranch, when I purchased the land and, as I understood, it came out of Indian Creek and dumped into the lake here.

(Testimony of Bert Ruud.)

Q. Now, will you locate on the map any other culverts?

A. There is a big culvert right here and when this big canal comes in we have a ditch that comes in down in this territory. Right in here is rather a high spot, and so in order to make the change in this highway we had to have a branch out in here, and there was a culvert here, and here is a culvert. There are three here.

Q. Will you point out the farmstead to the members of the jury? I am not sure that that has been done.

A. This is the farmstead here.

Q. That is where the house is?

A. Yes, sir.

Q. Now, go ahead and locate the culverts again.

A. There is another right here, and one right here that cuts off on the ditch; this main ditch goes clear through here, and when they cut this highway off, they had to borrow some land in here, and that is why this area in here is designated as brown; they borrowed a lot of the soil here to build up this fill and to make this new levee. And in going into my ranch they dug up a lot of rocks, and in going in there all of these rocks show. They were dug out of this soil and I allowed the contractor, Mr. [413] Burns, to pile them up along this ridge, which makes the place look bad, but it took the rocks out of that roadway, they were taken out of the roadway and they were too big to put in the fill. That is a culvert there and then there is another down here

(Testimony of Bert Ruud.)

and there was one down here. We had a ditch to cross into this corner—no, that is too far where I showed, it is down here (indicating).

Q. Are there any ditches that you use that join into the neighbor's on either side?

A. Yes; Mr. Smith, my neighbor, has a big ditch—this is Mr. Smith's land right here (indicating). We divide this water right in here and he takes water for his land down in this, and then he has a ditch that goes down here to water his land, and then it cuts back over and follows this ditch of mine right here. This ditch could be cut into mine and Mr. McKay has another ditch that follows that, and in years back these ditches were so that I could let Mr. Smith have all my water, or he could let me have all of his, and it was the same way with Mr. McKay. In the fall of the year this territory down here might need a little more water than this down here, and we had the use of these ditches after they spoiled that ditch down there to irrigate this country—

Q. —Will you state to the jury, if you know, how many culverts there are passing under the highway that deliver water to your ranch? [414]

A. If I remember right, it is eight.

Q. Now, will you tell the jury how you operated this ranch during this period that you have been there, what type of operation is it?

A. Well, we have operated the general farm, livestock, sometimes we had a lot of cattle and a lot of sheep and a lot of hogs. At one time we had

(Testimony of Bert Ruud.)

about 1,200 cattle, that was counting the calves and all. We had a forest permit for them and we had some of them in Grand Canyon and some in Gray's River Canyon, and we raised the feed for them, and then during World War I we kept these cattle down considerable. We owed quite a lot of money, prices were high and we wanted to get out of debt so we cut our breeding herd down pretty low. From that time on we operated less cattle and got into the sheep business and we ran 1,500 sheep and not quite so many cows. At that time we had forest permits for all of these cattle and sheep and then when we cut down from the sheep we went into the dairy business and hog business. We have always operated as a general farm, with livestock and we always fed our hogs and fattened them on the ranch and hauled them to market. We trailed our cattle from the ranch to Soda Springs, which would take us about a week or ten days on the trail——

Q. ——When was that? [415]

A. That was along in the early twenties.

Q. What has been the practice with reference to crops raised on the ranch?

A. We planted what we needed; we always tried to plant something that we could cash and if we didn't want to sell the grain we would cash it in through our livestock, such as hogs and sometimes we would feed out our cows and our steers. Through the years it is hard to remember just how we handled it, but we tried to handle it to our best possible advantage, and we always lived pretty well.

(Testimony of Bert Ruud.)

Q. Will you tell the jury what type of crops you have raised over the years?

A. Well, in the early years we always had a bin of wheat and a bin of oats. We used this wheat and we also let our neighbors have some wheat, we had a little flour mill in Afton, Wyoming, and we would take a load of wheat up there and get the grist and flour——

Q. ——Just tell us what you raised on the ranch, what kinds of grain?

A. Wheat, oats, and we haven't raised barley until about the last six or eight years; we didn't even know what it was; it was mostly wheat, oats and hay, and a few potatoes; we used to raise a lot of mangoes, sugar mangoes.

Q. What are those, what did you raise those for? [416]

A. They are good for all kinds of livestock; they are something like a sugar beet; we piled them up thirty or forty or fifty tons, and we used them through the winter to feed our livestock.

Q. Have you ever raised any seed potatoes?

A. We've raised a lot of photatoes but we have never been at it in a commercial way, but we have raised as high as five or six acres, and as low as just one acre.

Q. Over how many years did you do that?

A. We always had some potatoes.

Q. Now, will you tell the jury, if you can, Mr. Ruud, just what yields you received on this ranch in grains?

(Testimony of Bert Ruud.)

A. We would average on the home ranch about 40 to 60 bushels of wheat, about 70 to 80 bushels of oats, and our hay land would produce on an average of about three and a half ton, and we would sometimes cut our second crop, but if we had a lot of cattle it might be more profitable to pasture it. That would all depend on when we had to take them from the mountains or how many cattle we had and how many we were carrying.

Q. Do you know what your yield in hay would be per acre, in two cuttings?

A. It would be right close to five ton.

Q. With respect to the area shown in purple on the map, I think there is 90 acres, what has been the practice with [417] reference to farming that area?

A. For a good many years we just kept that in hay and fenced it off to itself. It was quite away from pasture from the rest of the ranch, and it was a wonderful piece of ground. We kept it in hay. I suppose we kept it in hay for 20 years. When you don't irrigate in that country you can keep it clean and it would produce more; if you irrigate it, it would mix it up with grass and you have got to plow it up and in that particular part we always thought we got as much in dollars and cents when we handled it in that way as if we irrigated and it was much less trouble.

Q. Have you ever raised any grain on it?

A. Yes; the last 15 or 20 years we switched it back and forth.

Q. Tell the jury now what the practice is with

(Testimony of Bert Ruud.)

reference to cropping that 90-acre tract, what your practice has been?

A. We would leave it in hay for a period of years and then if we needed some grain we would put it into grain, either wheat or oats.

Q. What has been the practice with reference to cropping it each year?

A. We have always grown a crop on it, every year. I think maybe one year a while ago, one of my renters got some [418] wild oats in a part of that land and we let it lay idle to clean it up. He wanted to put it back in and I had seen so many wild oats there I talked him out of it. He let it lay idle to clear up the wild oats, but I don't know just how much of it.

Q. Now, what is the practice with reference to operating that 90-acre tract and switching from one crop to another, just tell the jury what the practice is?

A. If it is in hay you plow it up, level it up and put it into grain. If it is in grain and you want to put it back to hay you just put in a nurse crop, you don't sow it quite so heavy to grain, and maybe the first year your crop won't be quite so heavy, but we don't notice much difference. It is wonderfully heavy soil, and very rich.

Q. Mr. Ruud, will you tell the jury what the practice has been—strike that, please—has there been any change in your method of operation of the home ranch in recent years?

A. Well, our forest permit—

(Testimony of Bert Ruud.)

Q. —Has there been any change, Mr. Ruud?

A. Yes.

Q. Just explain to the jury what that change is and the reason for the change?

A. Our forest permits in Grand Canyon. When they put that new highway in—we had that all to ourselves, we had [419] 28 miles of it and we were allowed to put as many cattle as we wanted to practically, but the forest people advised that on account of that traffic in there, and we started to lose cattle, they advised that we pull out and so we did, and they said that if we wanted other ranges that they would supply some in Caribou Basin and some in Gray's River. At that time this dam was about to be put over and we heard that we would only be there for a few more years so we just decided—

Q. —What time are you speaking of now?

A. I am speaking of the years 1942, '43, and '44, along in there.

Q. Is there anything further now in reference to the change in the practice of operation that you want to tell about?

A. Well, since then we have been more for a cash crop and not so much for livestock. We had a big dairy after that and milked about 50 cows and kept two or three families there and we went more into the hogs and the dairy business, with running maybe three or four hundred cattle that we would purchase to go into these different pastures; we would buy them in the spring and sell them off in the fall.

Q. Have you made any change then in your

(Testimony of Bert Ruud.)

operation since [420] the type of operation that you just described? A. Yes, sir.

Q. When did you do that?

A. Well, it looked here about three years ago that that might be the last year and so we quit handling the cattle. It looked a little dangerous and so we started to lease it then.

Q. How many years ago?

A. About three or four years ago, well, maybe it was five or six years ago that I started to lease it, but the last three years I lost control of it through leases outside of about a couple of hundred acres. I haven't lost control, but I mean I haven't farmed it any.

Q. What was the occasion of the change in that method of operation?

A. Well, it was hard to get labor. When the dam started there they copped all of the labor that there was in the valley, and the only way that we thought we could farm it to advantage at all was to lease it to different fellows that had their own labor. Some of them had real trouble, too. In that way we got a crop, but it wasn't as good as if I had been handling it under normal circumstances.

Q. What do you mean under normal circumstances?

A. Well, like we used to with plenty of help and with the [421] range right back and all, maybe it would have been a different tale.

Q. Mr. Ruud, what I am trying to find out, and I wish you would tell the jury if you can, how the

(Testimony of Bert Ruud.)

project interfered with the operation of your ranch?

A. Well, the main trouble was that they took all of our labor. In order to operate that spread, that is a pretty good sized farm, you know, and in order to operate it properly it requires a lot of labor.

Q. Did you know how long you would have the farm?

A. No, I didn't know. Ever since 1946 or '47 we thought maybe every year was the last year, and we had appraisers up there about every six months.

Q. Since when?

A. Since, well, it was along in 1945 or 1946, I believe we had appraisers and then this thing kind of died down and then we started to change our operation and then all at once in 1950 it sprung to life again and it looked like maybe 1951 would be our last year, and ever since that time each year was supposed to be our last.

Q. Now, you say you had appraisers. What do you mean, whose appraisers?

A. Government appraisers.

Q. When did they first appraise your ranch?

A. Well, Mr. Wallace didn't appraise it. I don't believe he [422] did but he came and got my abstract, if I remember right, in 1945.

Q. During the past few years when you have been leasing the ranch, what has been the method of operation then, and what has been the principal crop or crops?

(Testimony of Bert Ruud.)

A. The principal crop has been grain, some barley, some oats and maybe some wheat.

Q. Are there any springs on your property, Mr. Ruud? A. Yes.

Q. Will you state where they are located?

A. They are located in that—shall I point them out?

Q. In what color is it?

A. In the blue, right down on the south end.

Q. How many lakes are in that area?

A. We have three different lakes.

Q. Now, will you tell the jury with reference to these lakes how you put them in?

A. We originally put them in there for a fish pond and a boating pond and a hunting pond for the boys, and we also put them in there to have water on that particular area. We had a ditch coming out of it that we could open up and let it out on the land.

Q. Will you tell the jury what, if any, improvements you have on the ranch, other than the buildings? Is it fenced, is the ranch fenced? [423]

A. Yes; it is fenced, the ranch is fenced. It has that wonderful river there and it has a lot of value.

Q. What type of fence do you have on this ranch?

A. We have about 80% of it in net wire and the rest is in barbwire and has good native cedar posts. There might be 10% that isn't first class cedar posts.

Q. Are there any springs on the northern por-

(Testimony of Bert Ruud.)

tion of the bottom pasture, the portion shown in blue?

A. Only when we irrigate. There is an awful lot of water springs upon the northern portion in three or four places. It is a sort of a sub when we irrigate, yes, there is a lot of water there.

Q. Are there any other lands that you have had use of in connection with the home ranch?

A. Yes, sir; there are two isolated parts there.

Q. In which area?

A. That we have used ever since we owned the ranch, we ran a fence along here to the river and we have used this land ever since we have owned this ranch.

Q. And how many acres?

A. I think there is around 60 and there is a lot of riparian land along the river.

Q. Who owns that? A. The Government.

Q. And with whose consent did you use it? [424]

A. We tried two or three times to buy it and they said that it was withdrawn and that it was too small parcels to sell and they said to go ahead and use it until such time as maybe we could get together on it.

Q. Have you ever paid any rental on it?

A. When the Palisades came in there Mr. German noticed that the Government owned this and he sent me a bill each year just for a nominal amount and I mailed him a check for it.

Q. How much rent?

(Testimony of Bert Ruud.)

A. If I remember right—there is another piece down here in this corner, and if I remember right he charged me \$10.00 for each parcel. There is another one just like that down here. This is an isolated part and so is this (indicating). This particular part we built up quite a lot; there is a crop of clover in that, we sowed it and there is a lot of shade and it worked well with the pasture and it increased the carrying capacity of this pasture about 30%.

Q. Are there any other lands that you have used in connection with the home ranch?

A. There is a large island here (indicating) that we used, mostly for hunting and fishing, and we kind of claimed it as our own. When we were in the sheep business we used to put our rams on there. There is a channel of the river [425] that is pretty low and we could get over there on horseback any time; we could get there most any time except maybe in June.

Q. How many acres are on that island?

A. I imagine 15; there's an aerial map that I saw somewhere that shows that and I have traveled around it and I think there is 15 acres in that island.

Q. Will you tell the jury what use you have made, over the years, of the area shown in blue?

A. That is what we call our pasture.

Q. Just describe that pasture land to the jury.

A. Well, we think it is one of the most wonderful pastures in America. We have spent a lot of

(Testimony of Bert Ruud.)

time fixing it up; it has a lot of wonderful shade trees there and it has a lot of protection for the livestock; it has been the most wonderful thing that we own in our livestock operation. It's got springs on there where we can feed our cattle in the winter; there have been times when we have pastured as high as 700 head of cattle on a part of that land. That pasture, it seems, is the biggest asset to the cattle of anything we had; they would just stay there and go out in the meadows all day and stay there in the evening; there was always feed there. As I say, there were trees for shade and shelter and we always had good, fat cattle just because of that pasture. [426]

Q. Mr. Ruud, have you ever cropped any of that area?

A. Yes, we have; at one time we had about 50 or 60 acres of oats down there. We had five acres of potatoes at one place, and we had about an acre of potatoes at another place along with a garden.

Q. Now, directing your attention to the improvements on the ranch, will you tell the jury what, if any, improvements you had there?

A. We had it very well fenced; we have a good home, good barns, good tenant house. We had a wonderful corral where we could handle all kinds of livestock.

Q. What type of corral was that?

A. It is a sheep-tight and hog-tight corral, built very well out of cedar posts, and it has a loading chute; it has a place to unload cattle and a place to

(Testimony of Bert Ruud.)

brand them. We have a scale there, although we haven't used it for years, we have one there and we used to sell a lot of cattle right out of that scale.

Q. Will you tell the jury, if you can, as to whether or not you have placed any special valuation on your home?

A. Yes; I have put a valuation on it.

Q. And what valuation? A. \$20,000.00.

Q. You have heard the house described by other witnesses here. They have described it well, have they not? [427]

A. Well, there are a lot of things that they don't know that I do. We didn't intend to, but we put a lot in that house, when this thing, this dam project died down along about '46 or '7. We spent about \$4,000.00 overhauling our home, putting on the shakes and relining it and by that token, that is why I placed a value of \$20,000.00 on it.

Q. Have you placed any special valuation on the tenant house? A. Yes, sir.

Q. What valuation?

A. I think I have this listed here. I have a value of \$3,500.00 on that.

Q. What about the granary?

A. The granary is a very good granary and has a very good shed there, that will last a lifetime.

Q. And what is the capacity of that?

A. It has a capacity for a lot of machinery and about 5,000 bushels of grain.

Q. What special valuation, if any, did you place on that? A. \$4,500.00.

(Testimony of Bert Ruud.)

Q. What about the barn?

A. We have one large barn that we can store all kinds of feed in the top and underneath it has a place where we have stanchions for 50 dairy cows. That barn is built out of cement where we can just run water through it and wash it out in a half hour and make it just as clean as [428] a house. When we operated this dairy it was one of the finest dairy barns for the cattle that there was in the country.

Q. Mr. Ruud, you have heard the other witnesses testify with reference to the other buildings and improvements; have they enumerated all of the improvements in the way of buildings that you know of on the ranch? A. I believe so.

Q. Now, passing on to the land classifications, would you state to the jury just what classification you placed on the land and the values that you placed on it?

A. It was hard for me to make a classification and hard to make a price. I placed 330 acres at \$300 an acre, that was the best land.

Q. Where is that located?

A. That is more or less in the red color that you have there. You fellows did a pretty good job of picking it out there. That is the first time in my life that I have classified it.

Q. Does that include your classification of the \$300 an acre land, or is there other than what is shown in red on the map?

A. I didn't quite get that question.

Q. Does your classification of \$300 land, that is,

(Testimony of Bert Ruud.)

\$300 an acre land, does it include any other than the land shown in red on the map? [429]

A. Yes; I took a little more land into consideration than I think those other boys did. I took this land here (indicating). They complained about this being hard to get at, but it is as good as anything on the ranch and I included that in my classification, and I also included this old bedground for the cattle. I also included this (indicating) in the red. I know that some of these boys had, I believe, 295 acres, but I have included in that highest price the amount of 330 acres, I believe.

Q. And what other classification do you have with reference to the land?

A. I have 85 acres at \$250 an acre.

Q. In what color would that be on the map?

A. The classification that you have in orange.

Q. That would be the rest of the orange that you didn't classify in with the red? A. Yes.

Q. And that was at how much an acre?

A. \$250.00.

Q. And what other classification, if any, do you have?

A. I classified that 100 acres of pasture——

Q. ——Is that the area in blue?

A. Yes, sir; the area in blue.

Q. And what, if any, special valuation did you give that? A. \$200.00 an acre. [430]

Q. Is there any other classification?

A. There is the 38 acres in brown; that is all very good land except that it has been roughened

(Testimony of Bert Ruud.)

up a little by the highway, most of it, but it is easy to irrigate.

Q. That is the area in brown?

A. Yes, sir. And you have to fight the water off of that part, in fact, and it produces a lot of hay.

Q. What valuation, if any, did you place on that? A. \$200 per acre.

Q. Have you any other classification?

A. Did I give you the purple?

Q. No; I don't think so.

Q. I have got 90 acres of the purple; that's an awful thing to call it, purple, but I guess that's the way you want it classified.

Q. What, if any, special valuation did you have on that, on that 90 acres? A. \$200 an acre.

Q. Is that the 90 acres in the extreme northern portion of the ranch? A. Yes.

Q. Have you any other classification?

A. I have four acres of hillside pasture.

Q. What, if any, special valuation do you have on that? A. \$50.00 an acre. [431]

Q. Are there any other classifications?

A. I have what they have set aside as eight acres of rocky sagebrush, which used to be my stack yard and bed ground for my cattle.

Q. Which area is that?

A. I think you have it in green, all those little parcels out there, being about eight acres, I believe.

Q. What special valuation, if any, do you have on that? A. \$25.00 an acre.

(Testimony of Bert Ruud.)

Q. Do you have an opinion, Mr. Ruud, as to the highest and best use that ranch could be put to on March 4th, 1955?

A. As a diversified farm and livestock operation.

Q. Taking into consideration all of the factors that you know of concerning your home ranch, do you have an opinion as to the fair market value of this ranch, and by fair market value I mean that price in money or money's worth that it would bring if you were to put it on the market and willing to sell, but were not compelled to sell, and could sell it to a buyer, willing to buy but not compelled to buy, and considering the highest and best use to which it could be put, do you have an opinion as to its fair market value? A. Yes, sir.

Q. What is that opinion?

A. You are referring to the home ranch?

Q. Yes. [432] A. \$233,810.00.

Q. And, Mr. Ruud, while we are on the home ranch there, do you have any special valuation on the metal granaries? A. Yes, sir.

Q. How many are there? A. Twenty.

Q. And what is the special valuation, if any, that you have placed on the granaries?

A. The total cost of those granaries is \$8,500.00, and then there was setting them up and I estimate the cost at about \$10,000.00, that would be the exact cost.

Q. And that is the total valuation placed on the twenty granaries? A. Yes, sir.

(Testimony of Bert Ruud.)

Q. Do you have any opinion as to the highest and best use of the two-acre tract, Tract 34?

A. It will work right in with the rest of that.

Q. And bearing in mind my definition or statement with reference to fair market value, do you have an opinion as to the fair market value of that two-acre tract?

A. Yes; it would be the same as the rest, \$400 for the two acres.

Q. And how much an acre?

A. \$200 an acre. [433]

Q. Do you have an opinion as to the highest and best use for the Alpine ranch? A. Yes, sir.

Q. And what is that?

A. That would be just about the same as this other, except that it is not an irrigated ranch.

Q. Bearing in mind my definition with reference to fair market value, do you have an opinion as to the fair market value of the Alpine ranch, taking into consideration its highest and best use as of March 4, 1955? A. Yes, sir.

Q. What is that opinion? A. \$66,000.00.

Q. And is that the opinion you have as to the entire Alpine property?

A. Yes, sir; the total for the land and the improvements.

Q. Will you tell the jury, if you can, what, if any, soil classifications you made of the Alpine ranch?

The Court: Do you want to get the total valuation before you go ahead?

(Testimony of Bert Ruud.)

Mr. Holden: Yes, I will, your Honor.

Q. Mr. Ruud, do you have an opinion as to the total fair market value of your entire properties that are involved in this suit, taking into consideration the highest and [434] best use that the properties could be put to on March 4, 1955?

A. Yes, sir.

Q. And what is that?

A. For the thousand acres?

Q. For all the total, all three of the properties.

A. The total valuation is \$299,810.00.

Q. Will you state to the jury whether or not you have broken the Alpine ranch down with reference to various soil classifications? A. Yes.

Q. And what have you done in that regard?

A. I have classified 308 acres; it is more or less the same as has been described. I would describe it similar to Mr. Naegle or Mr. Cook. It is good mountain soil, some gravel in it which doesn't hurt, not as much as one man said. As I remember, one man said it was all rocks, but it has always grown a wonderful crop, and I put a value on it of \$125 an acre for 308 acres.

Q. Now, you made reference to some gravel. Will you tell the jury what type of soil that is on that land from your observation and what you know about it?

A. That land is more or less of a big washout of a big mountain there, and in places it has left a few little cobbles in a wash and it has gathered a little gravel, [435] that gravel is in spots and we

(Testimony of Bert Ruud.)

have just left them. We have never cultivated them but have cultivated around them. The rest of it lays well and is nice and level.

Q. What kind of soil is it?

A. It is good mountain soil with just a little gravel in it. Some of it don't have a bit of gravel in it and some down about six or eight inches you run out of gravel and into soil, and then down another foot you run into clay. It is one of the finest places in the world to hold moisture. You can get a rainstorm up there and have moisture practically the year around.

Q. What was your method or practice in operating the Alpine ranch?

A. Well, that has been varied. When I had livestock a lot of the time I pastured it and when I acquired it, it was a farm owned by a large family and they had quite a dairy operation there. They had it all into alfalfa and pasture.

Q. What crops, if any, did they grow?

A. Well, we raised all kinds of hay.

Q. Of course, you wouldn't know what the people who owned the ranch before you acquired it raised, so I will ask you what you have raised?

A. Well, as I said, I raised all kinds of grain, and then we have different kinds of grasses that we sowed in with the hay and we have had grain, and we raised wheat on that [436] ranch when we first plowed it up about six years ago; we plowed it all together and we had it all in wheat for, I think, three years, and maybe four years straight.

(Testimony of Bert Ruud.)

Q. Will you tell the jury what the production of the wheat was, what the yield was?

A. The production of wheat on that ranch ran all the way from 25 to 35 bushels.

Q. Are there any wheat allotments in the area?

A. We haven't paid much attention to wheat allotments. This one particular man that farmed that for me got killed in an accident on a hunting expedition. He may have had an allotment, but his widow didn't carry on with it, and I think if he had lived he might have had an allotment, because at one time he had over 300 acres of wheat.

Q. Do any of your neighbors have a wheat allotment? A. Yes; quite a few of them do.

Q. In the area of the Alpine ranch?

A. Yes; I think there is one allotment up there for 300 acres on one farm, maybe over that.

The Court: Mr. Holden, if I may interrupt you, I think the figures that Mr. Ruud gave as a total don't add up; there is a difference of \$400 in the total and the individual figures.

A. That is that two-acre tract that was not added in at the last. [437]

Q. Then what is the total figure as to the fair market value of the three parcels of land that is being taken, which are the subject matters of this suit?

A. We add \$400 to the total, which would make it.

The Court: According to the figures that he gave

(Testimony of Bert Ruud.)

here, and as I have added it, it would be \$300,000.00, to be exact, \$300,210.00.

Mr. Holden: That is what we have computed it to be, from his testimony.

A. That's right; the two acres was set off to itself and that has never been added into the total.

Q. Then what is the total, Mr. Ruud?

A. \$300,210.00.

Q. Now, will you tell the jury just what has been your practice with reference to the operation of the Alpine ranch, and the home ranch?

A. During the years we operated them together, sometimes we used it for pasture and cut the hay up there and use it at the lower ranch, and pasture it off early in the spring and early in the fall as they went to and from the forest. When we didn't have sufficient cattle on the forest, and sometimes when we had more at home, we would cut off part of that for pasture and use part of it for grain and hay. It was just rotated in conjunction with the home ranch. [438]

Q. You operated the two as a unit?

A. When we had a lot of cattle it was more or less of a pasture deal.

Q. What was your experience as to the efficiency in operation when it was operated by that method?

A. It worked in awfully well. We had to trail to the forest about twelve miles and this was about five miles from the ranch. When you move a bunch of cattle five miles the first day, it's nice to have a place to hold them and get the calves together and

(Testimony of Bert Ruud.)

get them ready to go on the forest the next day, and when you take them off the forest in the fall it's very handy to have that place to get them shaped up again and cut out the strays. In that country three or four of us might run cattle together or you might pick up someone else's cattle.

Q. Did you ever raise any crops on the land?

A. Yes, sir.

Q. And what with reference to machinery, Mr. Ruud?

A. We never kept any machinery up there, but the machinery we had on the home ranch we used up there.

Q. Have you ever raised any hay on the Alpine ranch? A. Yes, sir.

Q. Will you tell the jury, if you recall, what production you would receive in hay, alfalfa hay?

A. I would estimate all the way from two and a half to three [439] and a half tons.

Q. And how many cuttings would you have?

A. Well, we would get about two and a half tons on the first cutting and if we cut a second time, and most of the times we did, it might make three and a half tons.

Q. Were there times when you didn't get a second cutting of hay? A. Very seldom.

Q. But there were times?

A. Sometimes, but that country generally cuts a good second crop.

Q. Will you state whether or not you know if

(Testimony of Bert Ruud.)

any seed potatoes are raised in the vicinity of the Alpine ranch?

A. Yes, sir; there is quite a lot of seed potatoes being raised there this year. It seems that the country is demanding potatoes from this area and it is getting to be quite a thing.

Q. And now, going back to the soil and the classification of the soil, I believe you classified one area, now let me ask if there are any other classifications of soil on the Alpine ranch?

A. Yes, sir.

Q. And what are they?

A. They have a brown area in there (indicating); this is a sort of a bench that goes off into the river. It is not [440] a bluff; it is gradual and there is plenty of grass on it. It is a nice place for cattle to bed on. We had a big corral under this hill at one time and a fence on top, and the cattle bedded on there for years. It hasn't got the value of the rest of this land, and so I put a valuation on that piece of property, the 10 acres and these little strips here, that is, all of these make a total of 10 acres, and I placed a value of \$50 an acre on that.

Q. Are there any other classifications of soil on the Alpine ranch?

A. Yes; this particular part down here is an awful good sandy loam soil.

Q. I think you covered that, Mr. Ruud.

A. I just lumped all of that in together.

Q. Are there any other areas there that have a special classification?

(Testimony of Bert Ruud.)

A. This part in here that we have colored yellow, that has a classification as a townsite.

Q. How many acres do you have in that classification as a townsite?

A. I classified ten acres in the townsite.

Q. Are there any improvements?

A. Yes, sir.

Q. What improvements do you have on that townsite area?

A. We have a hotel and store building. [441]

Q. How many rooms in the hotel?

A. Seven rooms and two baths.

Q. And what, if any, special valuation did you place on that, I mean on the hotel?

A. I placed \$10,000 on it.

Q. And what, if any, special valuation have you placed on the store building?

A. On the store building I have \$5,000.00.

Q. And have you placed any other special valuation on any other improvements in this?

A. We had an old house over there at one time, we have converted it into a storage, and sometimes we use it for machinery and sometimes for a granary. It is pretty valuable for a place of this kind, it isn't a very large house, but I placed a valuation of \$500 on it. It is in good repair.

Q. Are there any other improvements?

A. I estimate that the pressure system and the pipe that we have strung around the town at around \$1,500.00.

Q. Now, will you tell the jury, if you can, from

(Testimony of Bert Ruud.)

your experience in that area, just what your opinion is with reference to the land for a townsite?

A. When this highway came up there and branched off, I think it was in 1944 or '45, they put the highway up the Grand Canyon, and Highways 89 and 26 joined there, and the [442] junction was right in front of our buildings. One building was on one side of the junction and one building on the other. We always had a large parking lot there and a lot of tourists stopped there. We had in mind putting other buildings there and we have had a lot of chances to sell property there. We knew lately that this dam was going to flood it all out, so that became nil, but we kept it for a townsite. During the time that I have been there, there has always been a store. I would say for 50 years there has been a store and a post office, and at one time there was a school. The school was taken down below, that is, moved in conjunction with another Idaho school, but during the time, that is, when the bridge was first built there before we even had a surfaced road, there was some sort of a little town there, and after this road went up the canyon we had so much tourist trade that it started to grow into a town, and when this dam came into effect some of the buildings were moved up toward the canyon and they have improved them up there and moved away from the town there on account of they knew that this would be doomed as a townsite and they are moving the highway away from it now.

Q. What, if any, special valuation have you

(Testimony of Bert Ruud.)

placed on the area that you have designated, the 10 acres that you have [443] designated as a town-site area?

A. I put a valuation of a thousand dollars an acre.

Mr. Holden: May I show these to counsel?

The Court: Yes; you may.

Mr. Furey: I have no objection to those pictures going in.

The Court: Then I understand they have been marked, is that right?

Mr. Holden: Yes; they are marked.

The Court: Then they may be admitted. They are Defendants' Exhibits Numbers 37 and 38, and are admitted.

Mr. Holden: They are two slides that we have had marked, but I think perhaps they may be too small and would not show the area well.

The Court: Are they numbered?

Mr. Holden: Yes; they are numbered.

The Court: What are their numbers?

Mr. Holden: They are Defendants' Exhibits Numbers 39 and 40. On the back of these pictures there is indicated what they are, of which ranch.

The Court: Are they ready to be handed to the jury?

Mr. Holden: Yes; they are ready [444] and may be handed to the jury with the Court's permission.

The Court: Very well, and we will go on with the testimony.

(Testimony of Bert Ruud.)

Mr. Holden: I think that is all, and counsel may cross-examine.

Cross-Examination

By Mr. Furey:

Q. Mr. Ruud, back in the days when you were running cattle, when did you usually start feeding them dry feed?

A. It would average some time around the first of December.

Q. Until when, when would you turn them out in the spring?

A. We generally had to feed until the first of May.

Q. That would be about four months?

A. Yes, sir.

Q. Mr. Groberg then was mistaken when he said there was an eight months feeding season up there?

A. Well, after listening to the testimony, I think that I could straighten that out if you would let me try.

Q. I say, was he mistaken, Mr. Ruud?

A. Yes; very much.

Q. He had the feeding season just about twice as long as it should have been?

A. Yes; he computed it in a different way than we do.

Mr. Furey: I believe that's all. [445]

(Testimony of Bert Ruud.)

Redirect Examination

By Mr. Holden:

Q. What is the length of the feeding season, Mr. Ruud, by months? What months do you usually feed?

A. December, January, February, March, April and we may taper off a little in December and we may taper off a little also in April.

Q. That would be five months? A. Yes.

Mr. Furey: That's right. I was mistaken in stating four months. I'm sorry.

Mr. Holden: That's all.

Mr. Furey: That is all.

The Court: Call your next witness, Mr. Holden.

PRESTON B. ELLSWORTH

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Holden:

Q. Mr. Ellsworth, would you state your name, please? A. Preston B. Ellsworth.

Q. Where do you live?

A. At Lewisville, Idaho.

Q. Are you married? [446] A. Yes, sir.

Q. Have you raised a family? A. Yes, sir.

Q. What is your business?

A. Well, farming and livestock.

(Testimony of Preston B. Ellsworth.)

Q. How long have you lived at Lewisville?

A. Sightly-eight years.

Q. On the same farm? A. Yes, sir.

Q. Do you operate any other farm land?

A. Yes, sir; I have four boys that worked with me on the farm, and we have a farm on the Lemhi in connection with the farm we operate at Lewisville.

Mr. Holden: Your Honor, I wonder if we might wait until the jurors just finish with those pictures?

The Court: Well, it has been my observation over the years that the jury can listen to the testimony and look at the pictures. If you want to wait, we'll wait.

Mr. Holden: I didn't want to interrupt them looking at the pictures. It's the first chance they have had to have a good look at this ranch.

The Court: If you want to wait, then we'll [447] wait.

Q. Now, Mr. Ellsworth, how many acres of farm land do you operate, together with your sons?

A. A little better than 6,500.

Q. Tell the jury just what type of an operation that is.

A. Well, on our farm at Lewisville we grow grain, sugar beets and potatoes, and hay, and we have grown some seed peas. And on our Lemhi ranch, why, we grow alfalfa and grass hay and some oats and barley, and then we have livestock there.

Q. How many acres of potatoes do you raise?

(Testimony of Preston B. Ellsworth.)

A. Well, generally about one hundred. We had a hundred and twenty this year, but generally about a hundred acres.

Q. How long have you engaged in this type of operation?

A. Well, we didn't go onto the Lemhi until the spring of '46, but I have, as I say, lived on my farm at Lewisville all my life, and together with—that is, at our operations at Lewisville we have always fed livestock in the winter.

Q. Have you any other farm lands in Jefferson County or Bonneville County? A. No, sir.

Q. And your holdings are in Jefferson County and in the Lemhi?

A. In Lemhi County, yes, sir. [448]

Q. Now, Mr. Ellsworth, during your years of farming operations, have you had occasion to become familiar with farm and land values in Bonneville County in southeastern Idaho?

A. Yes, sir.

Q. And during those years have you had occasion to visit various farming areas in Bonneville County? A. Yes, sir.

Q. And during those years have you had occasion to visit various farming areas in Bonneville County? A. Yes, sir.

Q. Have you ever had occasion during the years, during the past years in particular, to visit on farms in the Swan Valley, Grand Valley and Alpine areas?

(Testimony of Preston B. Ellsworth.)

A. Yes, sir; I went up there off and on all of my life. That is, ever since I was old enough to remember, and, of course, I have observed the farms because that is what I was interested in.

Q. Have you ever had occasion to discuss farm lands and farm values with farmers in the Swan Valley, Grand Valley and Alpine areas?

A. Yes, sir.

Q. Are you acquainted personally with farmers in those areas? A. Yes, sir. [449]

Q. When did you first become acquainted with the Ruud home ranch?

A. Well, it was somewhere in the early thirties that I first knew of the Bert Ruud ranch.

Q. And under what circumstances?

A. Well, I used to have a friend who was a stockman, and we went up there through that valley several times, and he would always point out the Bert Ruud farm to me. And then during the war, World War II, why I bought some steers from Mr. Ruud and that is the first time I ever met him. That was somewhere around '42 or '43, along in there.

Q. Did you go on the ranch at that time?

A. Yes, sir.

Q. And where did you take your steers? From the ranch? A. Yes, sir.

Q. Do you know whether or not those steers had been raised on the ranch?

A. Well, I couldn't say whether they had been raised there, but they had been pastured there, that season, that summer, I know that.

(Testimony of Preston B. Ellsworth.)

Q. In what area of the ranch were they pastured?

A. Well, on this land there down to the river; I think you have it marked on the map in blue. That's the pasture they came out of when I bought [450] them.

Q. And how many head of steers did you buy?

A. 125, if I remember right.

Q. Did you observe their condition?

A. I did.

Q. And what was it?

A. Well, they were the fattest grass cattle that I ever saw.

Q. Now, have you ever had occasion to appraise any lands in the Grand Valley area?

A. No, I haven't until you asked me to go up on Mr. Ruud's place in 1953.

Q. And did you appraise any other, or look over any other lands in the area at that time?

A. Yes, sir.

Q. And throughout the years, and during the last years in particular, have you become acquainted with the production of crops in the Grand Valley area and the Alpine area?

A. Yes, sir.

Q. And cost factors and so on, in raising crops?

A. Yes, sir.

Q. And I may have asked you this, but you have checked land values with owners in the area?

A. Yes, sir.

Q. And you are familiar with them? [451]

(Testimony of Preston B. Ellsworth.)

A. Yes, sir.

Q. Now, when did you first go up to the Ruud ranch to make an appraisal of that property?

A. On July 7, 1953.

Q. At whose request?

A. At your request.

Q. And did you ever go there on any other occasions for the purpose of appraising and checking over this property?

A. Yes, sir.

Q. State to the jury just when.

A. I went again on September—no, August 10th, 1953, and August 31, 1955.

Q. And are you related to any of the parties involved in this suit?

A. No, sir.

Q. Have you any interest in any of the land?

A. No, sir.

Q. Now, tell the jury, if you can, just what you did when you went up to the Ruud property to make this appraisal?

A. Well, now this may sound a little—

The Court: —Just answer the question.

A. The first thing I did was to take into consideration [452] the size of the unit of Mr. Ruud's operations where he could farm a thousand acres of land with the one set of machinery. That is the first thing that I observed, and then the location of his farm being on the highway and bus line service and truck line service, and school bus and the lay of his land, the condition of the soil, and the water that was available to his farm, his fences, and his buildings.

(Testimony of Preston B. Ellsworth.)

Q. You checked those matters during your appraisal? A. I did.

Q. And did you go over the land?

A. Yes, sir.

Q. Did you see Mr. Ruud at any time?

A. I saw Mr. Ruud on all three occasions.

Q. And did he point out the land to you?

A. He was more helpful in his boundaries and his fence lines than any other help he gave me.

Q. And tell the jury now with reference to your going onto the Alpine ranch and checking it. Did you check it in the same way?

A. Yes, sir, and on the same days.

Q. And you took into consideration those same factors? A. Yes, sir.

Q. Now, as a result of your experience as a farmer and your knowledge of lands in the area of the Ruud ranch, [453] and taking into consideration just what you did in connection with making your appraisal, do you have an opinion as to the highest and best use to which the Ruud home ranch, Tract Number 41, could be put March 4, 1955?

A. Yes, sir.

Q. Would you state to the jury just what that opinion is?

Mr. Furey: Just a moment. I'll object to that question, Your Honor, on the grounds that this witness hasn't been qualified as an expert on appraising real estate.

The Court: I'll have to sustain the objection, Mr. Holden.

(Testimony of Preston B. Ellsworth.)

Mr. Holden: Your Honor, we aren't qualifying him as an expert, but as a man who has been engaged in farming over the years, sixty-some odd years, familiar with land values in Bonneville County, particularly in Swan Valley, Grand Valley and Alpine, and who has discussed values with farmers and who has checked production of crops in the area and one familiar with valuations.

The Court: I can't change my ruling unless you can show qualifications in connection with making an appraisal of land.

Mr. Holden: Your Honor, I [454] would be very happy to furnish—I don't have it right here—I would be very happy to furnish citations with respect to qualifying one familiar with lands in the area, one who lives in the area, and the question would be with respect to where he might reside with reference to this ranch.

The Court: Well, during the evening, if you can show me where the Court is wrong, I will be very glad to change my ruling, but I will have to sustain the objection now the way I understand the law.

Mr. Holden: Then may we reserve the right?

The Court: Yes, you may.

Mr. Holden: That is all for the moment.

The Court: Call your next witness.

D. WORTH SMITH

called as a witness by the defendant, having been first duly sworn, testifies as follows:

Direct Examination

By Mr. Holden:

Mr. Holden: Now, Your Honor, with respect to Mr. Smith, Mr. Smith lives right across [455] from the Ruud ranch, and counsel, and has lived there for some forty years. He will testify that he is familiar with land values, ranch land, and those values in the area. Now, we don't intend to qualify him as an expert appraiser.

The Court: I would have to make the same ruling.

Mr. Holden: And he is familiar with productivity of the soil in the area——

The Court: ——Oh, well, I will let him testify as to all those matters. If you wish to question him with regard to other things, the soil and things of those kind.

Mr. Holden: I'll interrogate him up to that point if I may. On the other point I would use the same authorities as on the other witness.

Q. Mr. Smith, where do you live?

A. Irwin, Idaho, or Grand Valley.

Q. How long have you lived there?

A. All of my life.

Q. Where do you live with reference to the Bert Ruud home ranch?

A. Just across the road.

Q. How many acres do you farm, Mr. Smith?

(Testimony of D. Worth Smith.)

A. All together, or right there? [456]

Q. In that area, all together? A. Now?

Q. Yes. A. 659 acres, I believe, now.

Q. How many acres do you have in your Grand Valley ranch? A. How many do I have now?

Q. Yes. A. All together, 659.

Q. Have you owned any additional lands in that area? A. Not in that immediate area.

Q. Now, Mr. Smith, are you familiar, from your own knowledge, from your own observation, of the water available to the Bert Ruud home ranch?

A. I am.

Q. Do you know what the decree of water is with reference to date of priority for the water for the Bert Ruud ranch?

A. I have seen the record, and I think it is July 7th—anyway, it's 1900.

Q. It is a 1900 decree? A. That's right.

Q. And you are familiar with the period during the year when that decree right is cut?

A. Yes. [457]

Q. Will you tell the jury whether or not—strike that, please—do you have decreed water right in Indian Creek? A. Yes, sir.

Q. Is that the same creek in which Mr. Ruud has his water right? A. Yes, sir.

Q. Now, will you tell the jury, if you know, and if you can of your own knowledge, just how Mr. Ruud operated the irrigation of his home ranch from Indian Creek?

A. Will you give me that question again, please?

(Testimony of D. Worth Smith.)

Q. Yes, just state from your own knowledge how he would irrigate the home ranch with the Indian Creek water?

A. Well, he would turn the water in and go ahead and irrigate it just like all the rest of us.

Q. What was the practice after the middle of July of each year?

A. I have examined the records recently and the practice was to cut this water about the middle of July, but then, really, we never knew anything about it until we would see the Water Master, maybe two or three weeks later and he would tell you that you had been cut. We did go ahead and use the water up until that time and in most years up until in August some time we did have sufficient water to produce good crops. [458]

Q. Now, with reference to the water that you would use during the last part of July and August, was that rental water or do you know?

A. Yes, sir.

Q. From whom was the water rented?

A. We paid Mr. Crandell. I am sure that it was supposed to be the Twin Falls Reservoir in exchange for water they had in Twin Falls, well, I am not sure whether it was in Twin Falls or in Jackson Hole, in exchange for water that was in the creek. That's my understanding. Anyhow, we got the water down and it didn't cost very much.

Q. Do you know what the rental charge was that Mr. Ruud would pay?

A. I imagine maybe it was twelve or fifteen dol-

(Testimony of D. Worth Smith.)

lars a year; it run all the way from six to, I think one year we bought the creek, with what water was in it, and I think the creek cost us \$25.00. It was different cost in different years, but ordinarily it was from six to twelve or fifteen dollars, and never more than \$25.00. That \$25.00 was for all of us, I do remember that.

Q. Do you know whether on the practice of rental of the water, was there any preference shown to individuals in the right to rent it? [459]

A. Not that I remember.

Q. Now, will you tell the jury what the practice would be with reference to the way the water users on Indian Creek would use this stored water?

A. Well, when the water would drop down in the latter part of July or the first of August rather than each man take a small stream, why we would double this water up. You can cover more land with a big stream in less time than you can with a small stream. It was just good practice, it conserved the water and we didn't have any trouble about it.

Q. Now, Mr. Smith, have you ever had occasion to be on the Ruud ranch during cropping season?

A. Yes, sir.

Q. Did you ever observe it during the years?

A. Yes, sir.

Q. Have you ever assisted or helped with raising the crops? A. Yes, I have.

Q. With the irrigation of the ranch?

A. Yes, sir.

Q. Will you tell the jury what you know of your

(Testimony of D. Worth Smith.)

own knowledge with reference to the areas of the home ranch that have been irrigated?

A. All of this area here shown in red has been irrigated. [460] And all of this area down here to this line and part of this (indicating). However, at some time, I guess when I don't remember so very much about it, part of this has been irrigated, but all of this area here and this (indicating), and the biggest part of this bottom pasture.

Q. And do you know with reference to any other areas in the southern portion of the ranch?

A. This (indicating), has not been irrigated since they built the highway.

Q. Do you know what year that was?

A. I don't remember.

Q. Now, are you familiar with the Ruud ranch with reference to the productivity of the ranch and the various soil classifications? A. Yes.

Q. Will you state to the jury and designate on the map any soil classifications that you have in mind, and how you classified the Ruud home ranch with reference to various soil classifications?

A. Well, this land, starting at this end of the ranch from this break, which is a natural drain, which I think at one time was Indian Creek itself and the course has changed. It comes over through here now (indicating). From this point here, or about the middle here (indicating), [461] this land slopes this way, and from here it slopes down through here, approximately along in here some-

(Testimony of D. Worth Smith.)

where (indicating). This land on the north end, it slopes back toward this point. This land all has a gradual slope, sloping north, and it is what you would call level land, by that I mean there are no ups and down. It is easy to irrigate and has a gentle slope, plenty of fall to irrigate and, of course, in my estimation, this is the choice land in here (indicating). For one reason, Indian Creek canyon, the edge of the canyon comes to about this point. Indian Creek canyon is about, I would say, almost a mile wide at the mouth, and most of this land in here is built up as a delta at the mouth of the canyon.

Q. Are there any other areas on the home ranch that are comparable in soil classifications and productivity with the area in red that you have just designated?

A. Well, this orange land, in my estimation, is not quite as good, it is chopped up a bit because the highway goes through here, and you can't work a piece of ground like this and this (indicating), the same as you can this over here. It is not quite as good a soil, and there are little spots, here is a little spot right here. It is a little rocky place and it is at a different level. [462]

Q. How much of an area is that?

A. Oh, I would say it wouldn't be over a half or three-quarters of an acre, but the way this land lays, it is broken in here with this highway, this is a small area in here and this is small (indicating).

Q. In what color is that? A. Green.

Q. And what acreage is that?

A. Five or five and a fraction acres.

(Testimony of D. Worth Smith.)

Q. And what is the terrain there, or how did you classify that area in green, that five acre area?

A. It would grow hay all right; you could get a good stand of hay. It is a little rocky but if you would get a good stand of hay started there it would grow it all right, but in grain it is hard on plow-shares.

Q. Now, with reference to the area just east of the area in green that you have referred to a moment ago, what if any, classification do you have on that land?

A. Well, I have the same classification. It is just like this (indicating).

Q. And what is that classification?

A. That is good land.

Q. Good land? A. That's right.

Q. And you include that with the other classification of the [463] area shown in red?

A. That's right.

Q. Do you have any other breakdown on soil classifications?

A. This land up here is a delta formation built out of another canyon known as Blowout. This land has quite a slope, not steep at all, but a good gentle slope from the mouth of Blowout creek, which is back here (indicating). And this soil down here, well, I don't know how deep it is, but I know there used to be an old well up here where the school house was, and I remember the dirt piled up there. I don't know now because I don't remember how deep it was, but there was a big pile of dirt, I

(Testimony of D. Worth Smith.)

remember that, and I know that it is good deep soil, and it is good productive soil. I have seen hay grow up there to where it fell down and tangled up, and that is good hay.

Q. That was first crop? A. Yes.

Q. And what have you observed with reference to a second crop of hay on that area shown in purple.

A. It will produce a good second crop of hay.

Q. Do you know whether or not that area shown in purple has been irrigated through the years that you have been acquainted with it? A. No.

Q. Will you state to the jury just what you have observed with [464] reference to the farming of that 90 acre tract?

A. Mr. Ruud used to have that in hay and grain alternately, a few years in hay; I don't remember, but I know that you can have hay in that locality, you can plant hay there and it will last for 10 or 12 or 15, and in some cases, 20 years.

Q. Have you ever observed that 90 acres in a crop rotation setup? A. I have.

Q. What is the practice with reference to cropping it?

A. Well, he used to have hay there. I remember for years this was in hay.

Q. And did he raise a crop every year?

A. That's right.

Q. And what is the practice with reference to switching from grain to hay?

A. Well, you plant a nurse crop of grain when

(Testimony of D. Worth Smith.)

you plant the hay, you plant a little less grain than ordinarily, so that it gives the hay a chance to grow, but it will shade your hay, that is, the grain will shade your hay and it will have some protection for the small hay. You may have less grain that year and you may have a little less hay the following year, because most hay, that is, hay in most places takes two years to get established, but you can raise a good crop of grain the same year that you [465] plant the hay.

Q. Mr. Smith, I believe you stated that area had not been irrigated. What is the source of the moisture there?

The Court: We will recess at this time until tomorrow morning, and Ladies and Gentlemen of the Jury, will you please meet the Court here at 9:45 tomorrow morning.

November 15, 1955—9:45 A.M.

Q. Mr. Smith, what is the source of the moisture for the 90 acre area that you referred to just before the recess last night?

A. The area does have quite a lot of rainfall.

Q. And that area depends on the rainfall for its moisture?

A. That's right.

Q. Mr. Smith, are you familiar with the yields of grains in that area, in the area of that land?

A. Yes, sir.

Q. Will you state to the jury what the yields are of grains?

A. That land will grow 40 to 50 bushels of wheat,

(Testimony of D. Worth Smith.)

or 50 to 60 bushels of barley. I don't know as I could state as to oats although I do remember a crop of oats on there, but I don't remember what the yield on the oats was. That was quite some time ago, and I don't just remember the oats. For several years, when Mr. Ruud operated it, it [466] was in hay.

Q. Mr. Smith, are you familiar, and have you observed over the years, yields of grains and other crops on the remaining portion of the Ruud home ranch? A. Yes, sir.

Q. Will you state to the jury just what you observed as to that?

A. I would say that the remainder of the ranch, with the exception of those spots where it is marked brown on the map, the yield would be 10 or 15, 10 and maybe 15 bushels more than the area that is not irrigated.

Q. With reference to the area shown in red, what would the yield be with reference to that area?

Mr. Furey: May I ask a question, your Honor, in aid of a possible objection?

The Court: Yes, you may.

Q. (By Mr. Furey): During the years that Mr. Holden is asking you about, Mr. Smith, did you have occasion to have personal knowledge of the yields in the area inquired about?

A. You mean access to figures and such as that?

Q. Were you there at threshing time or at the time the crop was combined, or were you at the property so that you had occasion to learn what the yield was?

(Testimony of D. Worth Smith.)

A. No, these are my observations. [467]

Q. Your own personal observations?

A. That's right.

Q. Not what someone told you?

A. That's right.

Mr. Furey: I have no objection, your Honor.

Q. (By Mr. Holden): Now, with reference to the area shown in red, do you have an opinion as to the yield of grain in that area, from your own knowledge and observation? A. Yes, sir.

Q. Will you state to the jury what that is?

A. Well, it is land just like I have, or like I did have, and there was just a fence in between us, and it would produce—I have had barley go 80 bushels or better. I know it's the same type of land exactly. Wheat would be proportionate, wheat doesn't produce as much as barley, but I know it would grow 50 to 60 bushels of wheat.

Q. Now, Mr. Smith, will you state just what experience you have had in the livestock and cattle business—what experience you have had in that business for a number of years?

A. You mean my own actual experience?

Q. Yes.

A. I trailed my dad around since I was about six years old. [468]

Q. Do you know the length of the feeding season in the Grand Valley area on your ranch and the Ruud ranch? A. Yes, I do.

Q. Will you state what that is?

(Testimony of D. Worth Smith.)

A. Normally from about the first of December until the first to the tenth of May. I have turned the cattle out in the last few days of April and sometimes we have had to keep the cattle in until the 10th of May.

Q. Do you know what the hay tonnage is that is required to keep a critter during the feeding period of the year in that area?

A. Stock cattle, we always figured a ton and a half to the head, that's cows, calves and yearlings.

Q. A ton and a half to the head?

A. Yes, a ton and a half to the head.

Q. Of what? A. Of hay.

Q. And for how long a period?

A. From December until May.

Q. During the feeding season?

A. Five months, yes.

Q. Do you know what the passenger bus service is through that area, in the area of the Ruud ranch?

A. Yes, sir.

Q. Will you tell the jury just what the daily service is in [469] that area, going to Idaho Falls?

A. The bus goes by our place about 10:30 to 11:00 o'clock in the morning and comes back in the evening about between 7:00 and 8:00. We have a daily bus service, and then in the summer they run two busses. The one bus service is to Afton—from Afton to Idaho Falls, that is every day, and then in the summertime they run an extra bus schedule from Idaho Falls to Jackson Hole, and the bus, those drivers, will always get parts for machinery

(Testimony of D. Worth Smith.)

for you, either from Afton or Idaho Falls. They will deliver things and such as that.

Q. What time can you return home on the bus?

A. Between 7:00 and 8:00 in the evening.

Q. Of the same day? A. That's right.

Q. Are you familiar with the Ruud property located in the Alpine area? A. Yes, sir.

Q. How long have you been familiar with that land?

A. Since I have been familiar with the other, just as long.

Q. Will you tell the jury, and the Court, from your own knowledge, the crops that you have seen raised on that ranch?

A. They raise grain and hay and——

Mr. Furey: ——Excuse me, will [470] you have him specify the time, Mr. Holden?

Q. Will you specify the time if you can, Mr. Smith? A. You mean the number of years?

Q. Well, the number of years or the times that you are referring to with reference to the crops that you have seen raised there?

A. I have been up there more or less every year, several times a year, as a matter of fact. We generally buy groceries at the store there.

Q. I think counsel had in mind in reference to the years the crops were raised there, what you have seen and what the crops were that were raised?

A. Every year.

Q. And what type of crops?

A. Hay and grain.

(Testimony of D. Worth Smith.)

Q. What type of grain?

A. Barley, oats, wheat, not as much oats, but barley and wheat.

Q. What is the practice with reference to the Alpine ranch, so far as cropping it each year is concerned? A. Yes, I am familiar with that.

Q. And what is that practice?

A. They do crop it every year.

Mr. Holden: That's all, you may cross- [471] examine.

Cross-Examination

By Mr. Furey:

Q. Mr. Smith, generally speaking, and taking into consideration one piece of property which is the same type of ground located up there in that area, taking one piece, which is irrigated and one piece which is not, isn't it a fact that the part that isn't irrigated won't produce as much as the part that is irrigated?

A. Generally speaking that is right, but a lot depends on the type of soil.

Q. I understand that. But, Mr. Smith, let me ask you, rainfall doesn't take the place of irrigation up there, does it? A. In some years, yes.

Q. But over a long period of time. Isn't it true that land for which there is irrigation—for which they have irrigation water, wouldn't that be a little more valuable than land for which there isn't any irrigation water? A. Oh, yes.

Q. Mr. Smith, as I understand it, the feeding

(Testimony of D. Worth Smith.)

season up there is about five months. You start feeding dry feed about December 1st?

A. Yes, that's right.

Q. And you finish feeding out of the stack and turn them out on the range or, in your case and Mr. Ruud's case, [472] you turn them to pasture about May 1st to May 10th?

A. That's right.

Q. You have been in the cattle business a long time, haven't you?

A. Yes, sir.

Q. Would you say, knowing what you know about cattle operation, that it would be feasible or economical to try to operate a cattle operation where you had to feed for eight months?

A. That would depend on what kind of cattle operation you were in.

Q. Where you were keeping your foundation stock, raising calves and selling them?

A. That would be a long time to feed.

Q. And that would not be an economical operation?

A. No.

Q. As a matter of fact, it would not be economical at all nor profitable if you had to feed for eight months out of the year?

A. I don't know, I never tried that.

Q. In your opinion, would it be?

A. I don't think it would be practical, no.

Q. Mr. Smith, you say you have been living up there, right across the road from Mr. Ruud, for how long?

A. All of my life. [473]

Q. And you have been friends and neighbors with Mr. Ruud for a long, long time?

(Testimony of D. Worth Smith.)

A. That's right.

Q. And you also had land up in that area which was involved in this project? A. That's right.

Mr. Furey: That's all, thank you, Mr. Smith.

Redirect Examination

By Mr. Holden:

Q. Mr. Smith, did you irrigate your land this year? A. Irrigated a small proportion, yes.

Q. What proportion did you irrigate?

A. Not more than a fifth of it.

Q. Did you have irrigation water available for the remaining four-fifths? A. Yes.

Mr. Holden: I believe that's all.

Mr. Furey: That's all.

PRESTON B. ELLSWORTH

recalled as a witness by the defendant, after being heretofore duly sworn, testifies as follows:

Direct Examination

By Mr. Holden:

Q. Mr. Ellsworth, during the time that you were on the Ruud [474] property, the home ranch, in 1953 and 1955, I believe you testified—did you have occasion to observe the various soil classifications?

A. Yes.

Q. Will you just tell the jury what you observed with reference to the soil on that ranch?

(Testimony of Preston B. Ellsworth.)

A. Well, there is definitely two or three types of soil. Take the land—may I step to the map?

Q. Yes, go ahead.

A. In my opinion, this land in red is very productive land.

Q. What type of soil is that?

A. That is mountain soil, sandy loam, and close to this bar here, this is, in my opinion, about three feet down before you strike any gravel, the soil there is anyhow three feet deep and as you work this way the soil becomes lighter and as you get out here next to the road a little gravel will show up, but it is, in my estimation, very productive land. This pasture land in the field here, I think that is one of the best pastures that I have ever had the opportunity of seeing. It will grow any kind of grass that you would like to plant there, and it is certainly an asset to the place.

Q. Just point out the various soil classifications that you observed.

A. As we get over here, it is lighter soil, and probably [475] not as productive as this (indicating). This spot is about the same soil as this (indicating). As we go up into this purple, I find that this has never been irrigated.

Q. And what type of soil is that?

A. The purple is a little different type of soil because it comes from the mountain on this side. The soil has washed down from the mountain over here and it shows a little different color, but in my opinion it is very productive soil.

(Testimony of Preston B. Ellsworth.)

Q. Have you observed, at any times, crops growing on the Ruud home ranch? A. Yes, sir.

Q. Did you observe crops growing there during the year 1953? A. Yes, sir.

Q. Just state to the jury, if you can, what crops you observed growing there in 1953?

A. Most of this land was in barley, as I recall, at this home ranch.

Q. Did you see the barley crop at the time of its, during its maturity? A. Yes, sir.

Q. Do you have an opinion as to the yield of the barley per bushel per acre? A. Yes. [476]

Q. During 1953? A. Yes.

Q. Will you state your opinion of the yield from what you saw?

A. My observation was that it would average—I would judge that it would average about 70 bushels to the acre.

Q. For what year was that? A. 1953.

Q. Did you have occasion to observe the Ruud Alpine ranch? A. Yes, sir.

Q. Did you observe that on the same occasions that you observed the home ranch?

A. Yes, sir.

Q. Will you state to the jury what you observed with reference to the soil classification on that ranch?

A. That is a little different soil up there. I classified that as a lighter soil, but still very productive.

Q. Did you observe and check, when you were on

(Testimony of Preston B. Ellsworth.)

these ranches, the type of crops that were grown in the area of the Ruud home ranch? And on the Ruud Alpine ranch? A. Yes, sir.

Q. And what did you observe?

A. Well, the principal crops in that area are alfalfa, wheat, barley and oats. [477]

Mr. Holden: That's all, you may examine.

Cross-Examination

By Mr. Furey:

Q. Mr. Ellsworth, I'm not sure that I understood what your testimony was in regard to the yield on the home ranch. Did you state 70 bushels of barley per acre?

A. Yes, sir. That was my estimation in 1953, that the ground would yield 70 bushels to the acre.

Q. And that would be an average over the whole of the home ranch there?

A. Yes, sir. Some places down there, next to the house, I think that would run better than 70 bushels to the acre.

Q. That part down close to the house there, that was the choice land on the place? A. Yes, sir.

Q. The stand of barley was very thick there around the house, and also north and south of the house, is that right? A. Yes, sir.

Q. As a matter of fact, it was considerably more thick there than it was as you got up toward the outer portions of the ranch, wasn't it?

A. There was some difference, but I wouldn't

(Testimony of Preston B. Ellsworth.)

judge over five or probably ten bushels to the acre difference. [478]

Q. Did you ever see those crops in 1955?

A. Yes, sir.

Q. Were the crops about the same in 1955 as they were in 1953?

A. No, sir; in my opinion they would not yield as much.

Q. Now, Mr. Ellsworth, do you think that the parts of the ranch that have to depend on rainfall would produce as heavily as the parts that are irrigated?

A. No, in my opinion they would not.

Q. This part has more gravel than up in this area (indicating), doesn't it, Mr. Ellsworth?

A. Well, there is a little more gravel as you get next to the road, but in my estimation it is not enough to interfere with good farming and good cultivation.

Q. Isn't all of this portion in here (indicating), quite gravelly?

A. There is some gravel there, but not enough to interfere with good farming practices.

Q. It would cut down some on the yield?

A. Yes.

Q. The gravelly soil isn't going to produce as heavily as this down here (indicating), is it?

A. That's true.

Q. And this part here isn't as good as down here, (indicating)? [479]

A. No, sir.

Q. And this upper part here isn't nearly as good?

(Testimony of Preston B. Ellsworth.)

A. The extreme north, I understand that has never been watered and I couldn't see any ditches that would lead to the conclusion that it had been.

Q. There is no indication in this part here (indicating) of any irrigation?

A. Yes, about where your ruler is now, that ground showed signs of irrigation.

Q. Up above here? A. Farther north.

Q. This land here would not yield as much because of the nature of the ground and because there was no irrigation water?

A. I understand that there is irrigation water for it but there are no ditches.

Q. It wasn't being irrigated in 1955?

A. That's right.

Q. So the yield would be less because of lack of irrigation? A. Yes, sir.

Q. And it would also be less because it isn't as good as this land down here?

A. Yes, sir; that's right.

Q. And that would make a pretty fair reduction in the yield when you consider those two factors, and comparing it to [480] this top grade of soil down here?

A. I said, Mr. Furey, that the barley would yield much more down near the house. I think that barley would go 80 bushels.

Q. Then, to have 70 bushels to the acre for this area, in considering that this portion is not irrigated and never has been, and considering that this portion here is not as good a soil as down near the

(Testimony of Preston B. Ellsworth.)

house, and when you consider the hillside and the high spots that are rocky, you would have to have 100 bushels or more per acre in this area (indicating) in order to have it average out 70 bushels?

A. I didn't indicate, or I didn't intend to, rather; I was speaking only of the ground designated as red on the map when I said 70 bushels to the acre.

Q. I misunderstood you. I thought you said that 70 bushel was the average of the entire home ranch?

A. No; you did misunderstand me.

Q. The red is the only part that you think would yield 70 bushels; that is the only part you estimated.

A. Yes, sir; that's right.

Q. And these other areas would be considerably less?

A. Well, probably ten bushels to the acre; that would be my honest opinion.

Q. You have known Mr. Ruud for a long [481] time. A. Yes.

Q. And he has been a good personal friend of yours?

A. I couldn't say a good personal friend. I bought his steers back in 1941 and '42, and I have seen him probably four or five times since that time.

Mr. Furey: That's all, Mr. Ellsworth.

Mr. Holden: That's all; thank you, Mr. Ellsworth. If your Honor please, we rest.

The Court: Do you have any rebuttal?

Mr. Furey: No rebuttal.

The Court: We will take a recess for about ten minutes, and I will meet counsel in chambers and go over the matter of instructions.

INSTRUCTIONS OF THE COURT

The Court: Ladies and Gentlemen of the Jury: We have now reached the point in this case where it becomes the duty of the Court to explain to you the issues in the case which you are called upon to determine by your verdict, and to instruct you as to the law and the rules by which you must be guided in your deliberations. It is your duty to accept these instructions as correct, and so far as the law in the case is concerned, to be guided by the court's [482] instructions. The law provides an ample and adequate remedy whereby any mistakes in the instructions may be corrected, but it is not the province of the jury to undertake to correct mistakes of law which the court may make, and for the purposes of your deliberations the instructions which I will give you must be accepted as the law in the case.

* * *

Yours is a serious duty; it involves a matter of great importance to those who are parties to this litigation. Your selection as jurors was not by chance, but was because of your reputation for good citizenship, intelligence and fairness.

You should see that these defendants receive, under these instructions which I am about to give you, fair compensation, no more, no less, for the taking of their premises. You and I are a part of

the United States Government and each of us holds our place in this Government as an equal, and you, when you sit as jurors, are called to sit in judgment in this matter as a jury of the defendants' peers.

* * *

It is the duty of the Court to instruct you as to the law governing the case, and you shall take such instructions to be the law. You shall consider [483] the instructions as a whole and not pick out any particular instruction and place any undue emphasis upon it.

You will disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the Court, and any evidence which after the admission was stricken by the Court.

The statements of the attorneys in the case, made at the beginning of the trial and in their arguments, are not evidence and should not be considered by you as such.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received in this trial and your view of the premises.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to what effect, if any,

your verdict may have upon the future welfare of the parties. [484]

* * *

You have a right to consider the interest of any witness or witnesses in the outcome of the case in giving credence to the testimony of such witness or witnesses. You will consider his opportunity of knowing or becoming acquainted with the situation surrounding the matters about which they testify; you may consider their frankness or lack of frankness and from all these things you will say what weight the evidence is entitled to receive.

* * *

The Government comes into Court just as a private individual or a private corporation would come if such individual or corporation were in need of the lands here involved.

In other words, the Government comes here as a litigant or a petitioner, submitting itself to the jurisdiction of the Court and asks the Court, and that involves the jury, to say what it should pay for the lands involved here.

* * *

Testimony as to the market value has been given in this case by opinion witnesses, or expert witnesses. The opinion of such witness is admitted in evidence in cases where the value of property such as owned by the defendants in this case, and involved [485] here, is in issue. An opinion witness is one who testifies that he has sufficient knowledge concerning the matter, acquired by study, training

and observation or experience to permit him to give his opinion. Where the testimony of such witness is as to anything that can be observed and seen by any other witness, his testimony is to be viewed as that of any other witness, giving consideration to any particular training and experience he may have as to any bearing it may have upon any increased accuracy on his part over that of a person of ordinary experience. Insofar as his testimony is an expression of opinion based upon facts in the case shown by the evidence, you must, before considering the weight of the opinion of such witness, first find from the evidence that the facts upon which his opinion is based, are true. You are not bound by any opinion testimony, and it should be considered by you in connection with all the other evidence and should be given such weight as you believe it is entitled to.

* * *

Your view of the property I feel was very important, and you have a right to consider your view in arriving at your verdict in this matter. This you should consider in connection with all the other evidence submitted. [486]

It is necessary that the claim or claims of any party to a suit of this kind be proven by a preponderance of the evidence, and, of course, this is for you to decide in arriving at what you consider fair compensation in this matter.

* * *

By preponderance of evidence I do not necessarily mean the greater number of witnesses on a material point, but rather the weight of the evidence, that is, that evidence which when fairly, fully and impartially considered by the jury produces the strongest impression and has the greatest weight and is more convincing as to its truth or correctness when contrasted or weighed against the evidence in opposition thereto.

* * *

Under the Constitution of the United States it is provided that property will not be taken for public use except on payment of just compensation. You will note that the thing the private owner is entitled to when their property is taken for a public use is "just compensation." The Government of the United States possesses what is known in law as the "power of eminent domain," which means that in the exercise of its legitimate powers it has the right to take private property when such property is necessary [487] for public use and convenience. In the exercise of that power the Government institutes an action which is commonly referred to as a "condemnation proceeding," whereby it acquires title to the property of the individual upon condition that it pay just compensation to the owner of the property of which they are deprived.

* * *

While the value is to be fixed as of March 4, 1955, that does not mean that you must necessarily exclude from your consideration all evidence relat-

ing to other dates. Our estimates of the value of property are very often influenced and materially affected by our knowledge of the history of the property and the conditions which, it is probable, will exist in the near future.

Generally speaking, you have a right, in fixing the value as of that date, to take into consideration all facts and circumstances in evidence which people who are buying and selling lands would take into consideration in private negotiations for the sale of such lands; both the facts and circumstances which would tend to bear down the price, and the facts and circumstances which would tend to stimulate the price.

* * *

The necessity of the Government of [488] acquiring the property must not be taken into consideration, nor must any unwillingness to sell the property by the owners be taken into consideration in your deliberations. The owners of the property are entitled to receive as compensation for the taking by the Government, the value of the property for the use for which it is most valuable, and by this is meant the market value for that use, not its value to the owner for such or any other particular use, but that price which a reasonably prudent and careful man having knowledge as to valuations in the locality in question, and who is desirous but not under any necessity of purchasing would be willing to pay for the property having such uses in view, or, if he were the owner thereof, would be willing to accept as the purchase price of it, he

being under no necessity to sell. And while determining the fair, cash value of the property you will properly consider its capability and availability for the different uses to which it is reasonably and practically applied, you will, nevertheless, bear in mind that you are to ascertain and determine the full, fair, cash market value of the property as it existed on March 4, 1955. In determining the fair cash market value of the property sought to be condemned you will not permit yourselves to be influenced by the character of the petitioner as the Government of [489] United States, and neither will you permit yourselves to be influenced in any way by the character of the defendants, or the unwillingness on their part to part with their property.

* * *

At this point I will say to you that in determining the value of this land you must not take into consideration any added value that may be given to it because of the use for which the Government is taking it.

On the other hand, you must not deprive the owner of the value that the land actually possessed as of March 4, 1955, because of any threatened injury that might come to it because of the proposed use which the Government is to make of the property when taken.

* * *

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public use that it is impossible

to formulate an exact rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule, but the general rule is that just compensation to the owner is to be determined by reference to the use for which the property is reasonably and practically suitable and adaptable, having regard [490] to the existing business or wants of the community, or such as may reasonably be expected in the reasonably near future. The market value of land taken for public use includes its value for any use to which it may reasonably and practically be put, and all of the uses for which it is reasonably and practically adapted, and not merely the condition in which it is found at the time of the taking and to which it was applied by the owner at the time. Land, by reason of its location, surroundings, or natural advantages or inherent characteristics, may be peculiarly adapted to some particular use, and all of the circumstances which make up this adaptability are to be taken into consideration in determining the fair market value of the land and the just compensation to the owner thereof.

* * *

While the Court's statement of the law of the case must bind you and control you, any opinion or comment of the Judge as to the facts does not bind nor control you. Anything that I may have said or seemed to have said during these instructions or during the course of the trial with relation to the facts in this case, or any witness, is not to be considered as binding or controlling on you. For it

is the jury that determines the facts and the weight of the evidence and the credibility [491] to be given to the different witnesses and to the testimony of the respective witnesses.

* * *

Your verdict is to be your best judgment under your solemn oath based on the evidence, and your view of the property, in the case. Of course, you should not diminish fair compensation even one single dollar because you find that the government has need for the land, or because of any favor you might have for the government's action. Likewise, neither should you enhance fair compensation, even one single dollar, because of any feeling that the government should not have taken the property, or because you believe it would have been better had the landowner been allowed to keep his property. Neither should you increase your verdict even one single dollar because you feel that the government has ample money with which to pay.

* * *

The instructions you have already heard have been expressed in what may be, for the layman, rather formal legal language. However, they are not intended to be mysterious. You are in the same position in arriving at your verdict as a Judge of this Court would be if a jury had been waived. Your verdict should be founded on your judgment, your memory and [492] recollection, your experience, your common sense and your conscience.

You are not bound by the testimony of any wit-

ness as to any matter except as such appeals to your judgment and common sense and you are entitled to view it and to interpret it in the light of your experience.

* * *

In this case the defendant has testified as to what, in his opinion, is the market value of the defendant's lands, taken by the Government. You will give consideration to such testimony, since, under the law, an owner is qualified and permitted to express an opinion as to the value of his own property, when it is given for public use.

I am having the clerk give each one of you a sheet of paper on which is written the opinion of each witness as to the amount they fix as damages that the defendants have sustained on the taking of the property in question.

* * *

You have heard the witnesses and seen the exhibits offered in evidence. You have listened to the arguments of counsel and to the instructions of the Court and soon you will retire to your jury [493] room.

You may take with you for such further examination as you may desire the exhibits that have been admitted in the case, for consideration by you, and you will consider your verdict.

You are instructed, however, that in arriving at any verdict you are not permitted to add together different amounts representing the respective views of different jurors and to divide the total by twelve or by some other figure intended to represent the

number of jurors, or ideas, represented. Any such would be a quotient verdict and would be contrary to law and contrary to your oath. You are, of course, to give serious consideration to each other's views and reasoning in an honest endeavor to reach common agreement upon the verdict but such common agreement is to be based upon the final beliefs of each juror and must not be arrived at by the mechanical device of addition and division which constitutes a quotient verdict.

* * *

It will require the concurrence of the entire jury in order to return a verdict. When you retire to your jury room to deliberate you will select one of your number as foreman who will sign your verdict for you when you have agreed upon one, and who will represent you as your spokesman in the further conduct [494] of this case in Court.

There has been prepared for your convenience a form of verdict and in the blank therein you should insert what you determine to be fair and just compensation for the landowners.

Mr. Holden and Mr. Furey, will you please approach the bench?

The Court: Do you gentlemen have any objections to the instructions as given?

Mr. Furey: None, Your Honor.

Mr. Holden: None, Your Honor.

The Court: The bailiffs will be sworn. Ladies and Gentlemen of the Jury, you may retire to consider your verdict.

[Endorsed]: Filed April 15, 1957.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP), to wit:

1. Complaint.
2. Request for Taking.
3. Declaration of Taking.
4. Motion for Order for Delivery of Possession.
5. Order for Delivery of Possession.
6. Judgment on Declaration of Taking.
7. Motion and Order to Amend by Interlineation—American Packing and Provision Co.
8. Motion and Order to Amend by Interlineation—Ruud.
9. Disclaimer of Western Gateway Storage Co.
10. Return of Service as to American Packing & Provision Company, and George D. and Jean M. Keyser.
11. Notice of Appearance for Robert Morris.
12. Demand for Jury Trial for Robert Morris.
13. Demand for Jury Trial for Albert L. Jessen.
14. Notice of Appearance for Albert L. Jessen.
15. Motion and Order to Amend by Interlineation—Nihla Jessen Pangman.

16. Marshal's Return of Service on Earl Ford, Lester Ruud, Albert L. Jessen, Bert Ruud, Emma T. Ruud, Reuel Call and County of Bonneville, Nihla Jessen Pangman and Robert Morris.

17. Minutes of the Court of May 19, 1955.

18. Notice of Appearance for Bert Ruud and Emma Ruud.

19. Demand for Jury Trial for Bert Ruud and Emma Ruud.

20. Notice of Appearance for Archie Hill.

21. Motion and Order to Amend by Interlineation—Archie Hill and Jane Doe Hill.

22. Plaintiff's Interrogatories to Archie Hill.

23. Notice of Appearance for Archie Hill and Zola M. Hill.

24. Answers of Archie Hill to Interrogatories.

25. Motion and Order to Amend by Interlineation—Zola M. Hill.

26. Acceptance of Service for Archie Hill and Zola M. Hill.

27. Notice of Withdrawal of Attorneys for Robert Morris.

28. Motion to Dismiss Archie Hill and Zola M. Hill.

29. Minutes of the Court of November 4, 1955.

30. Minutes of the Court of November 7, 1955.

31. Appearance of E. H. Casterlin for Robert Morris.

32. Praecipe for Default—Bert Ruud, et al.

33. Default—Bert Ruud, et al.

34. Stipulation that defendants Bert Ruud,

Emma Ruud and Robert Morris will not make claim to any mineral values.

35. Minutes of the Court of Nov. 8, 1955.
36. Minutes of the Court of Nov. 9, 1955.
37. Minutes of the Court of Nov. 10, 1955.
38. Minutes of the Court of Nov. 14, 1955.
39. Minutes of the Court of Nov. 15, 1955.
40. Verdict of the Jury—Tracts 77, 41 and 34.
41. Motion for New Trial—Bert Ruud and Emma Ruud.
42. Judgment—Tracts 41, 77 and 34.
43. Stipulation—March 15, 1956, for Bert Ruud and Emma Ruud to file Brief.
44. Minutes of the Court of May 14, 1956.
45. Minutes of the Court of Nov. 26, 1956—
Overruling Motion for New Trial.
46. Notice of Appeal.
47. Bond for Costs on Appeal.
48. Designation of Contents of Record on Appeal.
49. Statement of Points on Appeal.
50. Designation of Additional Record on Appeal.
51. Order Extending Time for docketing appeal.
52. Transcript of Testimony (2 volumes).
53. Exhibits numbered 1 to 38, inclusive.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 15th day of April, 1957.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: No. 15546. United States Court of Appeals for the Ninth Circuit. Bert Ruud and Emma Ruud, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed April 17, 1957.

Docketed: May 9, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals, for the
Ninth Circuit.



No. 15546

**UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BERT RUUD AND EMMA RUUD,
APPELLANTS

VS.

UNITED STATES OF AMERICA,
APPELLEE

REPLY BRIEF OF APPELLANTS

**Appeal From the United States District Court
For the District of Idaho, Eastern Division**

**HOLDEN, HOLDEN & KIDWELL
Idaho Falls, Idaho
Attorneys for Appellants**

Filed October, 1957

FILED

OCT 21 1957

PAUL R. GIBSON, CLERK



No. 15546

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Idaho Ry. Co. vs. Columbia Synod, 20 Idaho 568, 119 Pac. 60	5

ARGUMENT

The attention of the Court is respectfully directed to page 385 et seq. of the printed record. The testimony shows that Mr. Ellsworth was an experienced farmer, familiar with the lands which were being condemned by the United States; familiar with their productivity and land values in the neighborhood. He was asked to state his opinion as to the highest and best use to which the Ruud lands could be put. The United States objected on the grounds that the witness was not qualified as an expert in appraising real estate. A discussion was had between counsel for Ruud and the Court, relative to the farming background of the witness and his familiarity with the lands in question and value. The Court stated: "I can't change my ruling unless you can show qualification in connection with making an appraisal of land." (R. 386)

A like ruling was made as to testimony of Smith.

The Trial Court held, then, that these witnesses, not having been qualified as expert real estate appraisers, were not competent to give an opinion as to the highest and best use to which the lands could be put. As far as this appeal is concerned, it is immaterial what the witnesses might have testified. The Trial Court held the witnesses not competent. An offer of proof would not change the issues. The question was whether or not a farmer is a competent witness to testify as to highest and best use, and as to value was presented to the Trial Court. The ruling of the Trial Court is assigned as error.

There was no objection made in the Trial Court that the testimony was cumulative.

The United States attorneys now contend that there is no showing what witnesses would have testified to, if permitted to answer. This is not the question presented in the Trial Court, nor the one on which the ruling was made.

The discussion of the Supreme Court in somewhat similar circumstances is significant: "No objection was made on the part of the government such as is now urged. The ruling went not to the sufficiency of the offer, but to the materiality of the evidence. If the evidence is an appropriate link in the chain of proof, that is enough".

McCandless vs. United States, 298 U. S. 342,
80 L. Ed. 1205

A party is not compelled to make a formal offer of proof to avail himself of error in rejection of evidence.

Meaney vs. U. S. (C.A. 2) 112 Fed. (2d) 538,
130 A. L. R. 973.

McGrath vs. Chung Young, 188 Fed. (2d) 975.

If the testimony is competent, its exclusion cannot help but affect a substantial right of a party.

Meaney vs. U. S. (C.A. 2) 112 Fed. (2d) 538,
130 A.L.R. 973.

McCandless vs. U. S. 298 U. S. 342, 80 L.
Ed. 1205.

Idaho Ry. Co. vs. Columbia Synod, 20 Idaho
568, 119 Pac. 60.

S U M M A R Y

The landowner is involved in a legal proceeding which he did not invite, create or initiate. The fact that the owner is denied the right to refuse to sell his own property affords good reason why he should be given every opportunity to disclose to the jury the real character of the property, its location, surroundings, highest and best use, its adaptability to any special use, productiveness and anything which affects the value as between buyers and sellers generally.

When testimony on behalf of the land owner is excluded, as to highest and best use and as to fair market value, the verdict certainly cannot be held to be "consistent with substantial justice". To refuse to permit him the right of Introduction of evidence through qualified, competent witnesses, is prejudicial.

Respectfully submitted,

HOLDEN, HOLDEN & KIDWELL

By William S. Holden

William S. Holden

Member of Firm

Residence & P. O. Address

Idaho First Nat'l Bank Bldg.

Idaho Falls, Idaho

I certify that three copies of above Reply Brief

were mailed to counsel for appellee this 18th day
of October, 1957.

William S. Holden

William S. Holden

No. 15546

**UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BERT RUUD AND EMMA RUUD,
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VS.

**UNITED STATES OF AMERICA,
APPELLEE**

B R I E F O F A P P E L L A N T S

Appeal From the United States District Court
For the District of Idaho, Eastern Division

HOLDEN HOLDEN & KIDWELL
Idaho Falls, Idaho
Attorneys for Appellants

Filed August....., 1957

F I L E D

AUG 21 1957

PAUL P. O'BRIEN, CLERK

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STATEMENT OF JURISDICTION

Jurisdiction is vested in the United States District Court by virtue of 28 USCA Sec. 1358, providing that district courts shall have original jurisdiction in all proceedings to condemn real estate for the use of the United States or its departments or agencies.

Jurisdiction is further based on 28 USCA Sec. 1291, providing Court of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

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**UNITED STATES
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**BERT RUUD AND EMMA RUUD,
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B R I E F O F A P P E L L A N T S

Appeal From the United States District Court
For the District of Idaho, Eastern Division

HOLDEN HOLDEN & KIDWELL
Idaho Falls, Idaho
Attorneys for Appellants



STATEMENT OF THE CASE

On March 4, 1955, the United States, as plaintiff, filed an action in eminent domain against appellants, as defendants, together with many other defendants, to condemn 1001.99 acres of land in Bonneville County, Idaho.

The property condemned consisted of three tracts, being Tract 34, a small two acre tract; Tract 41, known as the "home place", consisting of 671.12 acres; and Tract 77, designated as "Alpine property", consisting of 328.87 acres. Both plaintiff and defendants, Bert Ruud and Emma Ruud, requested trial by jury as to issue of just compensation.

Various other individuals were named as parties defendant. At the time of trial, however, either by default or disclaimer, all defendants had been eliminated with exception of these appellants, the defendants Archie Hill and Zola M. Hill, his wife, who claimed an interest in the premises by virtue of a lease of the hotel building located on the Alpine property; and defendant Robert Morris, who claimed an interest in the premises by virtue of a mining lease. A motion to dismiss the Hills as parties defendant was filed by the United States on November 2, 1955, and this motion was pending at the time of commencement of trial of the action. (p. 9)

Trial was held commencing November 7, 1955. At the start of the trial, after selection of the jury, the United States, appellants and Robert Morris entered

into a stipulation wherein Morris was awarded \$750.00 as just compensation. (p. 16) Archie Hill and Zola Hill, his wife, appeared with counsel at time of trial and over objection of Appellant's counsel participated in selection of jury. Appellant's counsel urged that the motion to dismiss as to Hills be heard before the selection of the jury and objected to Hills' attorney participating in the selection of the jury until after the motion to dismiss was disposed of. While the jury was viewing the premises, the court heard arguments of counsel on the motion to dismiss as to the defendants Hills, and granted the motion on the grounds they had no compensable interest. (p. 17)

During the trial of the case, considerable testimony was developed from appraisers for the government, Mr. Dick, Mr. Gourley, Mr. Newell and Mr. Carruthers, as to whether the Alpine ranch and a large portion of the home ranch were "dry-farm" land and had to be summer fallowed; whether the land was capable of growing a crop each year; whether the home ranch had adequate irrigation water to raise a crop each year; and the nature and kind of crops the lands were suitable for growing. The evidence showed the defendants' witness, Mr. Preston Ellsworth, was an experienced farmer, familiar with land values in the area during the time in question, and who had a personal knowledge of farming in the area in question, and particularly with respect to the Ruuds' land for many years. Mr. Ellsworth was not permitted to testi-

fy as to the highest and best use to which the properties could be put at the time of the condemnation (p. 385), nor was he permitted to express his opinion as to the fair market value of the lands. (p. 385)

The same situation arose with reference to defendants' witness, Mr. D. Worth Smith, an experienced farmer who had lived directly across the road from the Ruuds' home ranch for some forty years. The trial court refused to let him testify as to his opinion of the highest and best use to which the land could be put, or as to its fair market value. (p. 387) The Court, in not permitting the witnesses Ellsworth and Smith to testify as to highest and best use and fair market value of the land, limited testimony on these issues to expert real estate appraisers. He refused to permit experienced farmers living in the area and familiar with the properties in question and land values in the area to testify on these matters.

The jury returned a verdict for \$171,400.00, which was the value testified to by Mr. Newell, one of the government appraisers.

A motion for new trial on behalf of Bert Ruud and Emma Ruud was denied. This appeal followed.



SPECIFICATION OF ERROR

1. The Trial Court erred in refusing and failing to hear the United States' motion to dismiss, directed at Archie Hill and Zola M. Hill, prior to the selection of the jury. The motion was filed prior to time of trial, filing being made on November 2. On November 7, at time of trial, counsel for the Hills participated in the selection of the jury. Following selection of jury, the Motion was heard by the Court, and the action dismissed as to Archie and Zola M. Hill. (page 9, 17 of printed record). The court then stated to the jury: "Before we start with the evidence in this case, I think I should tell you, Ladies and Gentlemen of the jury, that when you were examined in your voir dire, there were several other defendants in this case. However, they have been eliminated from this case at this time and you will not be concerned with other parties other than Mr. Ruud and his wife, the case is confined to them now, and to their holdings. All of the other defendants are now out of the case and I make this statement to you so that you will not be concerned or looking for other defendants. They are (9) not here nor are they involved any further." (Page 26 of record)

2. The Court erred in refusing to permit Preston Ellsworth, an experienced farmer operating 6,500 acres of land, who had been familiar with farming operations in the Swan Valley area all of his life and with the Ruud lands for twenty-five years and who was familiar with land values in this area, to give an

opinion as to the highest and best use to which the home ranch could be put on March 4, 1955.

The objection of United States counsel was "Just a moment. I'll object to that question, your Honor, on the grounds that this witness hasn't been qualified as an expert on appraising real estate". (p. 385)

The Court: "I'll have to sustain the objection, Mr. Holden". (p. 385)

Mr. Holden: "Your Honor, we aren't qualifying him as an expert, but as a man who has been engaged in farming over the years, sixty some odd years, familiar with land values in Bonneville County, particularly in Swan Valley, Grand Valley and Alpine, and who has discussed values with farmers and who has checked production of crops in the area and one familiar with valuations." (p. 386)

The Court: "I can't change my ruling unless you can show qualifications in connection with making an appraisal of land." (p. 386)

3. The Court erred in refusing to permit Preston Ellsworth, a competent witness for the defendants, to give his opinion as to the fair market value of the lands involved in this action.

The objection of United States counsel was "Just a moment. I'll object to that question your Honor, on the grounds that this witness hasn't been qualified as an expert on appraising real estate." (p. 385)

The Court: "I'll have to sustain the objection, Mr. Holden". (p. 385)

Mr. Holden: "Your Honor, we aren't qualifying him as an expert, but as a man who has been engaged in farming over the years, sixty some odd years, familiar with land values in Bonneville County, particularly in Swan Valley, Grand Valley and Alpine, and who has discussed values with farmers and who has checked production of crops in the area and one familiar with valuations." (p. 386)

The Court: I can't change my ruling unless you can show qualifications in connection with making an appraisal of land." (p. 386)

4. The court erred in refusing to permit D Worth Smith, a farmer who lived adjoining the Ruud Home Ranch for forty years and who is familiar with land values in the area, and a competent witness produced by the defendants, to give an opinion as to the highest and best use to which the tracts of farm land involved in this action could be put on March 4, 1955.

Mr. Holden: "Now, your Honor, with respect to Mr. Smith, Mr. Smith lives right across from the Ruud Ranch, and counsel, and has lived there for some forty years. He will testify that he is familiar with land values, ranch land, and those values in the area. Now, we don't intend to qualify him as an expert appraiser." (p. 387)

The Court: "I would have to make the same ruling." (p. 387)

5. The court erred in refusing to permit D. Worth Smith, a competent witness produced by the de-

fendants, to give an opinion as to the fair market value of the lands involved in this action on the date of taking.

Mr. Holden: "Now, your Honor, with respect to Mr. Smith, Mr. Smith lives right across from the Ruud Ranch, and counsel, and has lived there for some forty years. He will testify that he is familiar with land values, ranch land, and those values in the area. Now, we don't intend to qualify him as an expert appraiser." (p. 387)

The Court: "I would have to make the same ruling." (p. 387)

6. The Court erred in requiring every witness testifying as to highest and best use of property to be a real estate appraiser.

7. The Court erred in requiring that every witness testifying as to fair market value be qualified as an expert real estate appraiser.

8. The verdict is inadequate and appears to have been given under the influence of passion and prejudice.

9. The verdict is contrary to evidence.

10. The verdict is contrary to law.

11. The Court erred in refusing to grant defendants a new trial.

ARGUMENT

The argument will be divided into Major headings, as follows:

	Page
1. Error in refusing to permit farmers to testify as to the highest and best use	13
2. Error in refusing to permit farmers to testify as to the fair market value of the premises	17
3. Verdict being contrary to law and evidence	20
4. Error of Trial Court in refusing to grant new trial	23

Specifications of error numbered 2, 3 and 6 will be discussed as a unit, since the points and authorities cited, and the argument, will apply to all these specifications.

Specifications of error numbered 4, 5 and 7 will be discussed as a unit, for the same reason.

Specifications numbered 8, 9 and 10 will be discussed as a unit, for the same reason.

Error In Refusing to Permit Farmers to Testify As to Highest and Best Use.

The same argument will suffice for the refusal of the Trial Court to permit the testimony of the two witnesses, Ellsworth and Smith.

The background of the witness, Preston Ellsworth, appears in printed transcript commencing on page 379 and may be summarized as follows: Is farmer, lives in Lewisville, Idaho, married, in business of farming and livestock and has been in that business

for 68 years, farms 6,500 acres and grows grain, sugar beets, potatoes, hay, seed peas, alfalfa, livestock; is familiar with farm and land values in Bonneville County and the Grand Valley and Alpine areas; knows Ruud ranch since early thirties; knows production of crops in the area, cost factors in raising crops; is familiar with land values in the area; had been over the premises. With this background, the witness was asked his opinion as to the highest and best use of the premises on the date of its taking and an objection of United States, on the grounds the witness was not qualified as an expert on appraising real estate was sustained (f. 385).

A similar objection was sustained to testimony of D. Worth Smith, an experienced farmer who lived directly across the road from the Ruud "Home ranch" (p. 387)

"All evidence should be admitted in the trial of a case which is admissible under statutes of the United States, or under the rules of evidence heretofore applied in the Courts of the United States or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of evidence governs the competency of a witness to testify shall be determined in like manner.

Rule 43 a, Rules of Civil Procedure
The Idaho Courts have adopted the practice of

permitting broadest latitude in the admission of evidence to show value.

State vs. Styner, 58 Idaho 233
72 Pac (2d) 699

The Idaho Courts have ruled upon the question of competency of witnesses to express an opinion of value. In the case of Idaho Western Ry., Co. vs. Columbia etc. Synod, 20 Idaho 568, 119 Pac. 60, the Idaho Supreme Court stated: "Evidence of value and damages in such cases as this should not be limited or confined to so-called expert witnesses; indeed it could not be, for the reason that it would be practically impossible to tell just what would constitute an expert in such matters." The Court went on to quote with approval, "The fact that the owner is denied the ordinary right to refuse to sell his own property . . . afford no reason for awarding him more than a just compensation; but it does afford good reason why he should be given every opportunity to disclose to the jury the real character of the property — its location; its surroundings; its use; its improvements, if any, and their age, condition and quality, its adaptability to any special use or purpose; its productiveness and rental value; and in short, everything which affects salability and value as between buyers and sellers generally."

Idaho Etc. Ry. Co. vs. Columbia Synod
119 Pac. 60, 20 Idaho 568

The same rule holds in Federal Courts. The Landowner is entitled to submit evidence as to the highest

and best use to which the property could be put.

United States vs. Powelson

319 U. S. 266

63 S. Ct. 1047

87 L. Ed. 1390

Atlantic Coast Line R. Co. vs. U. S.

132 Fed. (2d) 959

National Bank vs. U. S.

275 Fed. 855

McCandless vs. U. S.

298 U. S. 342

80 L. Ed. 1205

The views of the United States Supreme Court were clearly expressed in the case of McCandless vs. U. S., *supra*. The Court stated: "An erroneous ruling which relates to the substantial rights of a party is grounds for reversal unless it affirmatively appears from the whole record it was not prejudicial . . . in an eminent domain proceeding, the vital issue is just compensation. The proof here offered necessarily related to the value of the land when used for a purpose to which it probably could be put within the rule laid down by the Olsen case (citing). To exclude from consideration of the jury evidence of this elementary character could not be otherwise than prejudicial.

McCandless vs. United States

298 U. S. 342

80 L. Ed. 1205

Error in Refusing to Permit Farmers to give Opinion As to Market Value of Premises

The trial court refused to permit the two witnesses, Ellsworth and Smith, both experienced farmers, well acquainted with the property taken by the Government and market values of lands in the area, to express an opinion as to the fair market value of the premises.

Farmers living in the vicinity of the area condemned may testify as to its value, even though no sales have been made to their knowledge of that or similar property . . . the occupation of farming itself is usually deemed a sufficient foundation for their assertion of knowledge of value of agricultural property in their region, enabling them to judge the value of the particular property.

Montana Ry. Co. vs. Warren

34 L. Ed. 681

137 U. S. 348

11 S. Ct. 96

Pacific Livestock Co. vs. Warm Springs

Irr. Dist.

270 Fed. 555

Watkins vs. Mtn. Home Irr. Co.,

33 Idaho 623

197 Pac. 247

2 Lewis, Eminent Domain

Sec. 656, p. 1127

10 R. C. L. 218

Annotation 159 A. L. R. at page 11

It is reversible error to exclude opinion as to value of farm offered by farmers if they are familiar with the farm and with values in the neighborhood.

Cole vs. Ackerson, (N. Y.) 25 NYS (2d) 891

The attention of the Court is particularly called to the discussion in the case of Provo River Water Users Ass'n., vs. Carlson, (Utah) 133 Pac. (2d) 777 at page 782. The Court stated: (farmers) were familiar with land sales in the neighborhood and with the use and productivity of the land. The fact they were not trained real estate salesmen would not disqualify them. Witnesses who are familiar with the character of land near their own lands, acquainted with the conditions of moisture, type of soil, depth of soil and other physical factors frequently have a better idea of land values in the neighborhood than strangers who may be real estate salesmen but who have no detailed knowledge of the characteristics of the land."

Provo River Water Users Ass'n. vs. Carlson
(Utah)

133 Pac. (2d) 777

The point is especially significant in view of the record. The testimony of Mr. Dick, (appearing at page 32, et seq of record) was that he was manager of an irrigation district; that he appraised the land on the

basis of use being made at the time of appraisal (p. 48); that he made no effort to determine yield of the premises (p. 50); and that he didn't consider possibility of raising wheat (p. 58); potatoes (p. 58) or alfalfa seed (p. 60) and his appraisal was based upon the premise that the land would have to lie idle every other year — be summer fallowed, in order to produce a crop (p. 61).

Mr. Gourley, another United States appraiser, testified he was an auctioneer and banker (p. 124); that he made his appraisal on the basis of the use to which the land was being put (p. 146); and based on summer fallowing of the ground — a crop every other year (p. 150).

Mr. Newell, a U. S. appraiser, was the only farmer permitted to give an opinion as to highest and best use and as to value. He lived in Emmett, Idaho, which is approximately 400 miles from the land condemned (152); he based his appraisal on the yield on the ground at the time he saw it (p. 157) and didn't check into irrigating water (p. 195).

Of all the witnesses produced, the witness Preston Ellsworth was the only one, qualified from actual experience, to testify as to growing of potatoes. There was considerable discrepancy in testimony as to whether potatoes could be grown in the area, and the testimony of the person best qualified to express an opinion was excluded.

Inadequacy of Verdict, Verdict being Contrary to Law and Contrary to Evidence.

These questions will be discussed together, inasmuch as the same argument will apply to each.

The figure returned by the jury was the exact appraisal testified to by Mr. Newell, the farmer witness produced by the Government. The testimony of Mr. Newell showed the following:

A. He had never appraised any land in the Idaho Falls area previously, (p. 186)

B. Made very cursory examination of decreed water rights, (p. 193).

C. Had been furnished with appraisal reports made by other U. S. appraisers prior to examination of premises, (p. 188).

D. Despite complete lack of familiarity with the Swan Valley area, he made only the following trips to the Ruud ranch in order to determine value:

1. On March 30, 1955, with Bureau of Reclamation official in charge of land procurement, after being furnished with reports of other government appraisers, at a time when the ground was covered with snow (p. 155 and p. 188).

2. May 20, 21, 22. On May 20 did not appraise Ruud place. On May 21 went over Ruud place (over 1,000 acres), checked buildings and land. On May 22, went over Ruud place and place

across river belonging to another party, saw farmers planting crops and talked with farmers, (p. 156).

3. August 10, 1955, after condemnation proceedings underway, in company with United States attorney, went to farm to **determine yield**. Made appraisal on basis of yields observed at that time (p. 157, 161).

The other government witness, Mr. Carruthers based his opinion as to what the land would produce, upon stacks of hay in the fields (p. 213) at a time, when according to Ruud, the land had been out of crop rotation and in grain for the last three or four or five years (p. 346-357)

Stipulation of parties to this suit shows that the Palisades Dam was authorized on December 9, 1941, and reauthorized on September 30, 1950 (p. 280).

From 1945 or 1946 on, Government appraisers were on the Ruud land, and he was uncertain as to the length of time he could keep his land, and as a result changed his operations to the point where he has been raising grain for a much longer period than normally would occur, so that the yields of the crops at the time of the final appraisal, the appraisal on which the Government based its valuation for taking, were not truly representative of the yield the lands were capable of producing (p. 357, 358, 239).

The Declaration of Taking was filed March 4, 1955 (p. 15).

The appellants had for a period of three, four or maybe five or six years, been compelled to lease the land to other individuals after the construction of Palisades dam. This was necessary due to labor shortage caused by the construction of the dam, and uncertainty as to the length of time the Government would permit appellant to operate his land (R 357)

The land then, had been cropped to grain by the tenants for this extended period, which admittedly did not put the land to the highest and best use, and tended to run the ground down. This was not proper practice in farming, but was all that could be done under the circumstances, with imminent prospect of losing the land by condemnation.

At the start of condemnation, then, the land was appraised by the yield which the land was producing at that time. This, despite uncontradicted testimony that the land was out of rotation, had been cropped to grain for several years, yields were low, and the land was not being put to its highest and best use.

The testimony further shows that the tenants had not irrigated the premises, and that irrigation was injurious to the barley, causing a second growth.(p. 346)

The appellants had been harassed by government appraisers since 1945 or 1946; were unable to tell from year to year whether they would be on the place the next crop year, of necessity caused by this uncertainty and labor shortage due to dam construction, they had to discontinue his crop rotation and limit irriga-

tion on a large portion of the ranch. (p. 357, 239, 358)

They are compelled to accept a fair market value based upon production of land, in 1955, under these circumstances. The verdict is neither equitable nor just, and does not measure up to the requirements of just compensation that is guaranteed the appellants by all laws. The appellants have devoted their entire life to improvement and building up of the condemned property and should not be compelled to accept an award of "just compensation" based on this record.

The Court Erred in Refusing to Grant a New Trial

The law is settled that the authority to grant a new trial is based upon the common law principle that it is the duty of a presiding judge to set aside the verdict and grant a new trial. The judge has the responsibility to see that justice is done in each particular case.

A trial judge should not hesitate to set aside the findings of a jury to grant a new trial in a case where the ends of justice so require, and to prevent a miscarriage of justice.

Felton vs. Spire

78 Fed. 576



SUMMARY

The cumulative effect of the innuendo that the other defendants have reached amicable settlement with the United States, the refusal to permit the witnesses who were best informed as to the use and productivity of the premises to testify as to the highest and best use and the fair market value, permitting only one farmer, a complete stranger in the area, a government appraiser, to furnish an opinion to the jury; the inherent injustice of an appraiser making an appraisal, when he is totally unfamiliar with the premises and has been furnished with the reports of prior government appraisals, and who based his appraisal on current production, at a time when the land admittedly is not being put to its highest and best use is manifestly unjust.

The appellants are entitled to have the verdict set aside and a new trial granted them before another jury.



Respectfully submitted,

HOLDEN, HOLDEN & KIDWELL

By

William S. Holden

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A member of the Firm

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I certify that three copies of above Brief were
mailed to Counsel for Appellee this *15th* day of Aug-
ust, 1957.

William S. Holden

William S. Holden



**In the United States Court of Appeals
for the Ninth Circuit**

No. 15546

BERT RUUD AND EMMA RUUD, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, EASTERN DIVISION**

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
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FILED

SEP 26 1957

PAUL R. DEAN, Clerk

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**In the United States Court of Appeals
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No. 15546

BERT RUUD AND EMMA RUUD, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, EASTERN DIVISION*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal filed on January 21, 1957 (R. 20-21), from a judgment (R. 14-20) filed on December 15, 1955, awarding just compensation for property condemned by the United States.¹ A motion for new trial was overruled on November 26, 1956 (R. 20). The jurisdiction of the district court was invoked under various Acts of Congress authorizing this proceeding, specified in the petition for condemnation (R. 3-4), including the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

¹ The notice of appeal erroneously states that the judgment was entered on November 15, 1955.

QUESTIONS PRESENTED

1. Whether in a condemnation proceeding there is prejudicial error in the district court's refusal to permit farmers to testify as to the highest and best use of the property and its market value, when the landowners' expert witnesses testify thereto.

2. Whether an award which is based on substantial evidence should be set aside as inadequate.

3. Whether a trial court's ruling on a motion for new trial is reviewable when no abuse of discretion is shown.

STATEMENT

On March 4, 1955, the United States instituted proceedings to condemn the fee simple title to certain lands in Bonneville County, Idaho, for use in connection with the construction, operation and maintenance of the Palisades Dam and Reservoir. This is a Federal Reclamation project, for regulating the flow of the Snake River, a tributary of the Columbia River, for controlling floods, improving navigation, providing for storage and the delivery of the stored waters thereon in connection with the reclamation of arid and semi-arid lands, and the generation, distribution and sale of electric energy as a means of financially aiding such undertakings (R. 3-9). A declaration of taking was filed and there was deposited as estimated compensation the amount of \$152,250 (R. 15, 420). The three parcels here involved were owned by appellants, Tract No. 34 containing 2 acres, Tract No. 41 containing 671.12 acres, and Tract No. 77 containing 328.87 acres.

At a trial before a jury for the determination of just compensation, the Government introduced four expert appraisers. Their valuations ranged from \$165,769.90

to \$171,400 (R. 44-45, 133-135, 162, 180-181, 208-209). In valuing the property, they took into consideration the following factors:

The property was improved by a modern home with running water and a central heating plant, and a number of buildings used in the operation of the property as a farm. There was also an old store building on one tract which had been remodeled into a hotel and was used for renting rooms, and another building used as a cafe. The property was partially fenced. Part of the land was rocky, and the soil on other portions was of a more mellow type and suitable for raising grain or hay and grazing cattle. There were several springs on the property and small lakes had been made of some of them to retain the water in a storage capacity. The property was available to schools and churches, and was served by an all-winter highway. There was daily bus service and mail delivery to the property. Portions of the land were irrigated (R. 39-44, 128-135, 141-145, 159, 164-165, 169-178). It was the opinion of these witnesses that the highest and best use of the land was for dry farming, raising such crops as barley and grass for feeding cattle (R. 39, 158, 207).

Appellants introduced three real estate appraisers who valued the property at \$249,350, \$252,503 and \$255,-460.25 (R. 228-229, 316-317, 285-286). Mr. Ruud testified at length as to the improvements to and the natural attributes of the property, the use he formerly had made of the land, and the use to which he believed it adaptable. His total valuation of the three tracts was \$300,210 (R. 342-377). Appellants also introduced two witnesses who were farmers in the neighborhood of the subject property (R. 379-380, 388). They testi-

fied as to the soil classifications and its productivity (R. 391-398, 402-408). On objection of the Government because they were not experts on appraising real estate, they were not permitted to testify as to the market value of the property, or to give their opinions as to its highest and best use (R. 385-386, 387).

The verdict of the jury was in the amount of \$171,400 (R. 11). On December 15, 1955, a judgment accordingly was entered (R. 14-20). A motion for new trial was overruled on November 26, 1956 (R. 20). This appeal followed (R. 20-21).

ARGUMENT

I

There Was No Prejudicial Error in the Court's Refusal to Allow Farmers to Testify as to the Highest and Best Use of the Property and Its Market Value.

A. *A sufficient showing of prejudice to justify reversal of the trial court by this Court does not appear.*—Appellants argue that the trial court was in error in refusing to permit the witnesses Ellsworth and Smith, who were farmers in the vicinity of the subject land, to testify as to the highest and best use of the property and its market value (Br. 13-19). However, no offer of proof was made of the testimony these witnesses would have given if they had been allowed to testify, and this Court cannot judge the relevancy of the excluded evidence. This Court has stated repeatedly the general principle that a ruling rejecting testimony is not reversible in the absence of an offer of proof. *Fidelity & Deposit Co. of Maryland v. Lindholm*, 66 F.2d 56, 60-61 (1933); *Sacramento Suburban Fruit Lands Co. v. Miller*, 36 F.2d 922 (1929); *Romeo v.*

United States, 24 F.2d 527 (1928). The same rule was announced by the Supreme Court in *Origet v. Hedden*, 155 U.S. 228, 235 (1894); and *Herencia v. Guzman*, 219 U.S. 44, 46 (1910); and has been followed in other circuits: *Sorrels v. Alexander*, 142 F.2d 769 (App. D.C. 1944); *McVeigh v. McGurren*, 117 F.2d 672, 679 (C.A. 7, 1940) certiorari denied, 313 U.S. 573; *Downie v. Powers*, 193 F.2d 760, 768 (C.A. 10, 1951); *Hoffman v. Palmer*, 129 F.2d 976 (C.A. 2, 1942), affirmed 318 U.S. 109.

Appellants quote a part of Rule 43(a), Federal Rules of Civil Procedure (Br. 14) as to the admissibility of evidence, but ignore the provision in section (c) when evidence is excluded for making a specific offer of what is expected to be proved by the answer of the witness. The obvious purpose of this rule is "to permit the examining attorney to make such record that an appellate court can determine whether there was reversible error in excluding the evidence. * * * If the significance of the excluded evidence is not obvious, the offer of proof must be made to preserve the question on appeal." Not having a record of the proffered testimony the court cannot judge its competence. *Downie v. Powers*, 193 F.2d 760, 768 (C.A. 10, 1951).

When the court sustained the Government's objection to the testimony of the witness Ellsworth as to the highest and best use of the property (R. 385), counsel for appellants, instead of stating what he expected to prove, simply stated that he was not qualifying the witness as an expert, but as a man who had been engaged in farming over the years, familiar with land values in that area, and who had discussed values with farmers and who had checked production of crops in

the area and one familiar with valuations (R. 386). He made a similar statement as to the witness Smith (R. 387). Obviously, this Court cannot judge the competency of the excluded evidence, and the ruling offers no ground for reversal. Thus, the statement of appellants' counsel that the witness had discussed values with farmers and had checked the production of crops in the area indicates that the testimony might well have included considerable hearsay. Expert valuation witnesses may properly consider such hearsay, but since the exception rests on the expert's ability to properly weigh such evidence, the exception should not apply to non-experts. *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 662 (C.A. 4, 1952); *H. & H. Supply Co. v. United States*, 194 F.2d 553, 556 (C.A. 10, 1952). Moreover, there is no way of telling in this record what the valuations of those two witnesses would be and, hence, whether appellants would be prejudiced by exclusion of their evidence. It will not do simply to assume that because a party offers the evidence it would have been favorable to him. Cf. *District of Columbia Redev. L. A. v. 61 Parcels of Land*, 235 F.2d 864 (App. D.C. 1956).

B. *The qualifications of a witness are reviewable only for an abuse of discretion or a clear error of law.*—Whether a witness is qualified to express an opinion on the value of realty and the weight to be given his testimony are preliminary questions for the trial judge, the determination of which is within his discretion, and his decision is conclusive unless there has been an abuse of discretion or a clear error of law. *Chapman v. United States*, 169 F.2d 641, 645 (C.A. 10, 1948), certiorari denied 335 U.S. 860; *Love v. United States*, 141 F.2d 981, 983 (C.A. 8, 1944); *Hickey v. United States*,

208 F.2d 269, 278 (C.A. 3, 1953), certiorari denied 347 U.S. 919. See also: *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117, 130 (1920); *Sacramento Suburban Fruit Lands Co. v. Soderman*, 36 F.2d 934 (C.A. 9, 1929); Wigmore on Evidence, 3d Ed., Vol. 2, sec. 561. Admittedly, the witnesses Ellsworth and Smith were not expert real estate appraisers (R. 386-387), and the trial court did not abuse its discretion in rejecting their testimony as to the value of the property. Since they were not expert appraisers, they were not qualified to testify as to the highest and best use of the land for any purpose but for farming. An expert appraiser is qualified to testify to the use of the land for various purposes, and although all of the expert witnesses stated that the highest and best use of the land was for farming and cattle raising, there was no error in the trial court's ruling that these two witnesses were not so qualified.

C. *Appellants are not prejudiced by the trial court's refusal to allow Ellsworth and Smith to testify as to the highest and best use of the property and its market value.*—The trial court, particularly in valuation cases, has a wide discretion as to the admission of testimony, so that it is, for example, empowered to limit the number of valuation witnesses for each party and otherwise to keep the evidence within reasonable limitations. We submit that in this case, in view of the other evidence in the case whereby both the landowner and his three expert witnesses had presented all appropriate matters to the jury, it was not an abuse of discretion to exclude the opinions of persons unqualified as experts. *Chapman v. United States*, 169 F.2d 641, 643 (C.A. 10, 1948), certiorari denied, 335 U.S. 860; *Dickinson v. United*

States, 154 F.2d 642, 643 (C.A. 4, 1946); *Foster v. United States*, 145 F.2d 873, 875 (C.A. 8, 1944).

Thus, Mr. Ruud himself, and his three expert appraisers, testified to the highest and best use of the land. His opinion was "as a diversified farm and livestock operation" (R. 367). The witness Groberg, who was an appraiser of considerable experience, and had had experience in the operation of farm land (R. 215-219), testified that the highest and best use for the subject land was "for a diversified farm, principally irrigation farming * * * raising grain, hay and other cultivated and irrigated crops, some pasture, and feeding of livestock." He considered the home ranch most suitable for a rotation program of farming, grain, wheat, barley, oats, and stated that alfalfa hay would be very practical. He also stated: "And I am of the opinion also that there are portions that would be adaptable for raising seed potatoes. It is good soil and good climate and they are being raised in that vicinity. * * * The best seed potatoes come from the higher elevations." He stated that these areas are similar to the Ruud home ranch. (R. 225-228). The witnesses Cook and Naegle gave almost identical opinions as to the highest and best use of the property (R. 284-285, 315-316, 322). Mr. Naegle was the owner of a farm also (R. 310).

Although the trial court did not permit the witnesses Ellsworth and Smith to testify as to the highest and best use of the property in so many words, they were permitted to testify at length as to the classification of the soil on the various portions of the property, and to state what crops would be most productive in the soils as so classified (R. 393-398, 402-405).

Appellants seek to show (Br. 15-19) that there was no evidence at all as to the highest and best use to which

the property could be put, and that the Government was opposed to the admission of any such evidence. On the contrary, its expert witnesses were specifically asked their opinions. Mr. Newell stated (R. 158): "My opinion is that its best use was either for growing of grain or grasses, it could grow hay, I think it could grow alfalfa hay." And further (R. 166): "The production of small grains, hay and pasture would be the principal and best use." Mr. Carruthers stated that his opinion as to the highest and best use of the property was "for the production of small grains and hay." (R. 207). Mr. Dick's opinion was "dry farming, barley, grass pasture for feed" (R. 39). Since the opinions of the Government's witnesses are so similar to those of the landowners' witnesses, all being experts, it is assumed that the witnesses Ellsworth and Smith would have given similar opinions. If not, they certainly should not be admitted in opposition to the expert witnesses offered by both parties.

The Idaho Supreme Court cases relied upon by appellants (Br. 15, 17-18) do not support their contention that there was error in the court's refusal to allow these witnesses to testify. In those cases, witnesses who were not qualified as experts were permitted to testify, the court holding that no prejudicial error had been committed thereby. If the witnesses Ellsworth and Smith had been permitted to testify here, there might well be no abuse of discretion justifying reversal for a new trial, but it by no means follows that the exclusion of such evidence when there are ample valuations by qualified experts constituted error.

II

The Award Is Based on Substantial Evidence, Hence Appellants' Factual Argument Presents Nothing for This Court to Review

Appellants' argument that the verdict is contrary to law and contrary to evidence (Br. 20-23) is an attempt to have this Court conduct a trial *de novo* and, after reweighing the testimony heard by the trial court, find that the award is inadequate. However, the federal appellate courts do not assume the function of retrying the facts and will not set aside condemnation awards if supported by substantial evidence. As this Court stated in *Simmonds v. United States*, 199 F.2d 305, 307 (1952):

Since the question of credibility is for the District Court and the award is within the range of the testimony, the award cannot be set aside on appeal.

See also: *Hoblik v. United States*, 151 F.2d 971, 973 (C.A. 8, 1945); *3,535 Acres of Land, etc. v. United States*, 146 F. 2d 872, 874 (C.A. 5, 1945); *United States v. 2.4 Acres of Land, more or less, etc.*, 138 F.2d 295, 297-298 (C.A. 7, 1943); *Murray v. United States*, 130 F.2d 442, 444 (App. D.C., 1942).

It is obvious from the evidence that the verdict was not inadequate as a matter of law. The lowest appraisal of the market value of the property by the Government's witnesses was \$165,769.90 (R. 44-45), and Mr. Ruud's opinion of market value was \$300,210 (R. 372). The jury awarded \$171,400 (R. 11). It is plain, therefore, that the award is within the range of the evidence and cannot be said to be inadequate. *Love v. United States*, 141 F.2d 981, 982 (C.A. 8, 1944); *Miller v.*

United States, 137 F.2d 592, 594 (C.A. 3, 1943). And because the jury made an award more in line with the appraisals of the Government's witnesses, is not proof that it did not fully consider the testimony of appellants' witnesses. There is no reason that compels the triers of fact to accept any specific valuation where the evidence covers a wide range, nor one that precluded the jury from considering the valuations of the Government's witnesses in the light of other evidence. *Phillips v. United States*, 148 F.2d 714, 716 (C.A. 2, 1945); *Stephens v. United States*, 235 F.2d 467, 471 (C.A. 5, 1956).

Appellants sought to have the trial court reject the testimony of the Government's expert witnesses by lengthy cross-examination (R. 45-94, 122-124, 136-151, 181-196, 200-201, 203-204, 210-214). They now ask this Court to review the qualifications of these witnesses (Br. 18-19, 21), not on the ground that the trial court has abused its discretion or that there is a clear error of law, but simply because they think their own witnesses were better qualified. This Court can readily see that the trial court had ample grounds for admitting the testimony of these witnesses and believing it. He saw the experts "on whose personal appearance so much depends in an issue like this" (*United States v. Delano Park Homes*, 146 F.2d 473, 475 (C.A. 2, 1944)), and since there clearly was no abuse of discretion nor any error of law in the admission of their testimony there is nothing for review.

III

There Was No Abuse of Discretion in the Trial Court's Denial of Appellants' Motion for a New Trial

In *Steiner v. United States*, 229 F.2d 745 (1956), certiorari denied 351 U.S. 953, this Court announced the rule (p. 749) that a motion for new trial is "addressed to the district court's discretion. The denial of such a motion is reviewable, if at all, only for an abuse of discretion." There are no fixed rules which the district court must follow, except a consideration of what is just. *Murphy v. United States District Court, etc.*, 145 F.2d 1018, 1020 (C.A. 9, 1945); *Boise Payette Lumber Co. v. Larsen*, 214 F.2d 373, 380 (C.A. 9, 1954). The Supreme Court set forth the grounds on which a new trial may be based which would invoke the discretion of the trial court, in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, (1940): "* * * that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

Since the appellants' motion for a new trial raised such questions (R. 11-14), the discretion of the court obviously was invoked. Appellants do not point out any instances of abuse of discretion (Br. 23, 25). Being familiar with all the circumstances of the trial, and considering the entire record, the trial court in denying the motion for a new trial did not abuse its discretion. Its refusal of a new trial was not "inconsistent with

substantial justice.” *Everett v. Southern Pacific Co.*,
181 F.2d 58, 62 (C.A. 9, 1950).²

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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SEPTEMBER 1957.

² Although not expressly discussed as a point of the brief, appellants complain in their statement of points, in their statement of the case, and in their summary (Br. 5-6, 9, 25), of the failure of the court to rule on the motion to dismiss other parties until after the jury had been empaneled and viewed the land. Here again the time when the court will rule on a motion of this sort is plainly within its discretion. There was no abuse here. It was eminently reasonable and conserving of the time of all parties to conduct the argument on that matter while the jury was viewing the property. Moreover, it is difficult to see how appellants could be prejudiced with regard to this collateral matter. It could not, therefore, constitute ground for reversal, particularly in view of the court's instruction to the jury (R. 26).

No. 15550

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTHONY A. ALESİ,

Appellant,

vs.

GORDON L. CORNELL, Officer in Charge, Immigration and
Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

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United States Attorney,

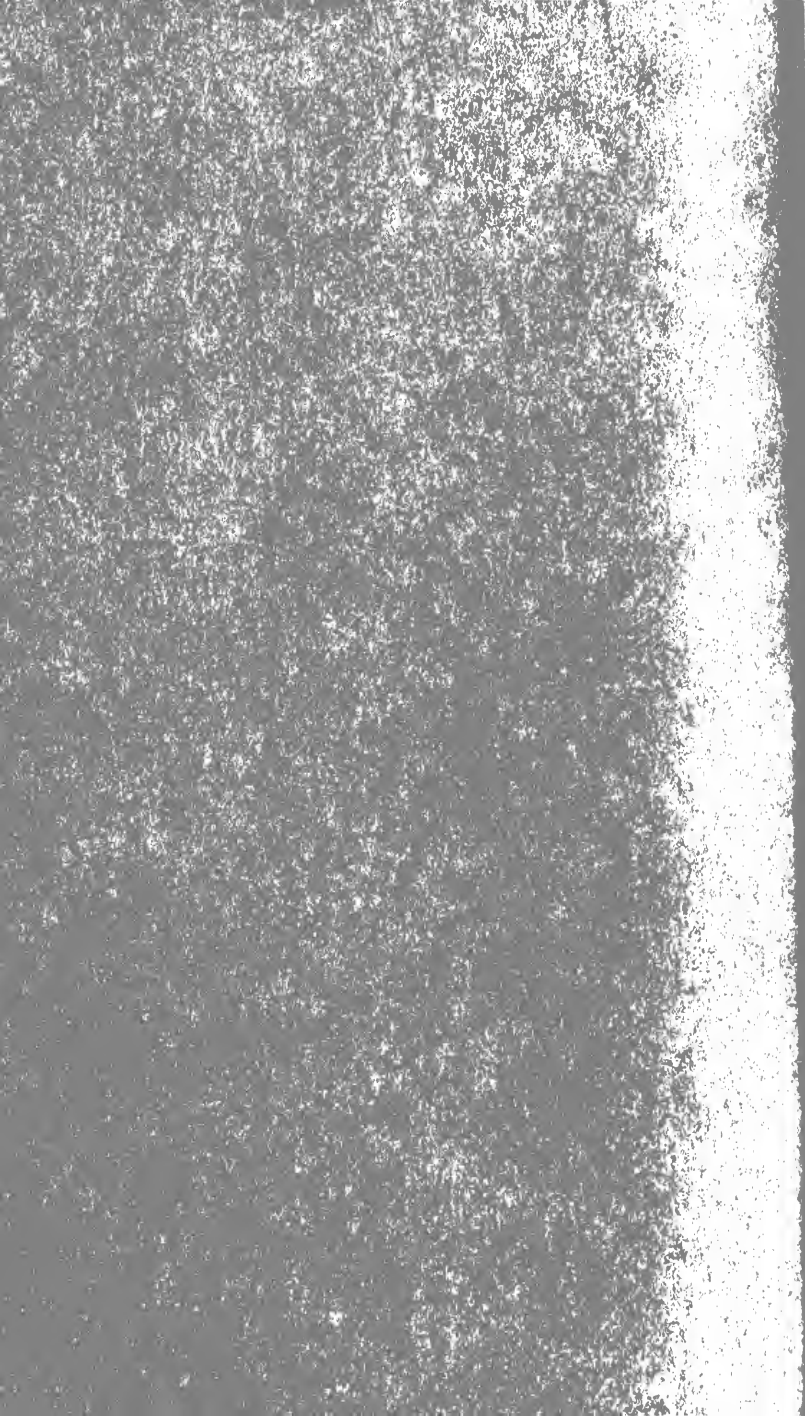
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Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

On January 4, 1956, appellant filed in the United States District Court for the Southern District of California a Complaint for Injunction and Declaratory Judgment. [Tr. of R. 2.]* On February 17, 1956, an Answer to the Complaint was filed by appellee. [Tr. of R. 8.]

On December 3, 1956, the case was tried before the Honorable William M. Byrne, and on December 17,

*Tr. of R. refers to the Clerk's Transcript of Record; R. T. refers to the Reporter's Transcript of Proceedings.

1956, the relief prayed for in the Complaint was denied and judgment rendered in favor of the appellee. [Tr. of R. 34-38.] A timely notice of appeal was filed on February 13, 1957. [Tr. of R. 39.]

The District Court had jurisdiction pursuant to the provisions of Title 8, United States Code, §§1251(a)(4), 1329, and Title 5, United States Code, §1009.

This Court has jurisdiction of the appeal pursuant to the provisions of Title 28, United States Code, §1291, and Rules 73 and 75 of the Federal Rules of Civil Procedure, Title 28, United States Code Annotated.

Statement of the Case.

Appellant is a citizen of Italy, by reason of his birth at Ciminin, Palermo, Italy, on June 21, 1912, [Tr. of R. 27.] He was admitted for permanent residence to this country on July 24, 1913, through the Port of New York. (*Ibid.*)

On February 14, 1955, a warrant of arrest in deportation proceedings was issued by the Immigration and Naturalization Service at Los Angeles, California, charging that appellant was subject to deportation under Title 8 U. S. C. §1251(a)(4), in that he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal conduct. [Tr. of R. 30.] The aforesaid warrant was served upon appellant on February 24, 1955. (*Ibid.*)

A deportation hearing was held March 10, 1955 at which time appellant was present and represented by

Lloyd A. Tasoff, an attorney at law admitted to practice before the Immigration and Naturalization Service. (*Ibid.*) At the hearing appellant admitted convictions for five criminal offenses since 1940. [Ex. A, Hearing of March 10, 1955.] The proceeding was adjourned at the request of said counsel, in order that the Government's evidence might be met. (*Ibid.*) [Tr. of R. 30.] At the time, appellant stated that he understood the case was adjourned to a future date, and that he would be notified by mail of the resumed date. [Ex. A, Hearing of March 10, 1955.] Appellant provided the Immigration and Naturalization Service with his then present address. (*Ibid.*)

On May 2, 1955, the Immigration and Naturalization Service wrote letters to appellant and his counsel, advising them that the hearing would be resumed on May 23, 1955. [Tr. of R. 30.] On May 16, 1955, appellant's counsel wrote the Immigration and Naturalization Service, sending a copy of his letter to appellant, advising that he had withdrawn as appellant's counsel, and that he had informed appellant several times to obtain other counsel, if that was his desire. (*Ibid.*) [Ex. A, Hearing of March 10, 1955, Ex. 12.] At the time of trial, appellant testified that Mr. Tasoff had informed him that he had withdrawn as counsel. [R. T. 7.] He further testified he had "no recollection" of having received the notice of May 2, 1955. (*Ibid.*)

Neither appellant nor anyone on his behalf appeared before the Immigration and Naturalization Service on

May 23, 1955. [Tr. of R. 31.] There is no record of any proceedings having taken place on that date. [Ex. A.]

Appellant was arrested in Nevada on June 6, 1955, and was returned to face criminal prosecution by local authorities in Los Angeles. [R. T. 8; Tr. of R. 29.] He was notified while in jail that another hearing in his immigration case would occur July 1, 1955. [R. T. 9.] On July 1, 1955, neither appellant nor anyone on his behalf appeared before the Immigration and Naturalization Service, and the Special Inquiry Officer on that date ordered appellant deported, after first finding that he had been given reasonable opportunity to appear on May 23, 1955. [Tr. of R. 31; Ex. A, Decision of July 1, 1955.]

On July 13, 1955, appellant appealed to the Board of Immigration Appeals. [Tr. of R. 31.] A brief was filed on behalf of appellant. Oral argument was had on August 17, 1955 and on October 10, 1955, the Board affirmed the decision below by dismissing the appeal. (*Ibid.*) The points raised on appeal to this Court were not presented to the Board in the administrative appeal. [Ex. A.]

ARGUMENT.

I.

Hearing of May 23, 1955.

Two of the questions raised on appeal involve the “deportation hearing of May 23, 1955.” It is argued that there is uncertainty in the record as to whether appellant received actual notice of the hearing, apparently because appellant testified at the trial below that he had “no recollection” of receiving the notices which the Immigration and Naturalization Service mailed to him and to his attorney on May 2, 1955. It is also argued that these notices were not reasonable, within the meaning of 8 U. S. C. 1252(b), which provides that a determination of deportability shall be made only when an alien has had a reasonable opportunity to be present.

One could find that appellant was given such a “reasonable opportunity to be present” from the facts that a notice was mailed to his last known address, and was not returned, and that a copy of such notice also was sent to appellant’s counsel. It could also be inferred that appellant’s absence from the May 23, 1955 proceeding was due to his own wishes, as he was returned to Los Angeles involuntarily, only after his arrest in Nevada. However, even if it be assumed that there was insufficient notice, there is no showing made that any prejudice resulted from the alleged error.

First, appellant’s absence from the May 23, 1955 proceeding was not prejudicial because of anything which the Immigration and Naturalization Service did in his

A. Appellant has not offered any excuse for his late retention of counsel, even though he was aware as of February 24, 1955 of the March 10, 1955 hearing. [Tr. of R. 30.] Any unpreparedness of his attorney cannot be laid at the door of the Immigration and Naturalization Service.

B. His attorney had had sufficient time to familiarize himself with the case so as to be able to have present and examine a witness for appellant, *i. e.*, his wife. [Ex. A, Hearing of March 10, 1955.] Furthermore, the case was not so complex as to require very much preparation. In essence, the Government's evidence consisted of documents showing the convictions of appellant. Although his counsel wanted an opportunity to consult with appellant concerning these convictions, before proceeding with the case, appellant admitted the truth of the convictions. Thus, there would not appear to be prejudice from the presentation of the Government's case. Appellant was represented by the counsel of his choice and they had the opportunity to examine the evidence introduced.

Cf.:

Low Wah Suey v. Backus, 225 U. S. 460, 470;

Landon v. Clarke, 239 F. 2d 631, 636 (C. A. 1, 1957);

United States v. Neelly, 202 F. 2d 221, 223 (C. A. 7, 1953);

Ex parte Marino, 50 F. 2d 582, 586 (9 Cir., 1931);

Scif v. Nagle, 14 F. 2d 416 (9 Cir., 1926);

Sinicalchi v. Thomas, 195 F. 701, 705 (6 Cir., 1912).

C. The adjournment of the hearing at the request of appellant's attorney [Tr. of R. 30], would seem to remove any prejudice from the alleged error. The continuance afforded appellant an opportunity to consult with his attorney and prepare any defense desired, or to point out deficiencies in the evidence previously presented.

D. Since appellant did not raise on his administrative appeal the question of deprivation of counsel, apparently he did not feel that he had been sorely aggrieved thereby. In any event, it is elementary that he should have exhausted his administrative remedies.

United States v. L. A. Tucker Truck Lines, Inc.,
344 U. S. 33, 36, 337 (1953);

Bustos-Ovalle v. Landon, 225 F. 2d 878 (C. A.
9, 1955);

United States v. Ncelly, 202 F. 2d 221, 224 (C. A.
7, 1953).

E. Finally, appellant admitted the truth of the Government's evidence at the hearing of March 10, 1955. [Ex. A, Hearing of March 10, 1955.] That evidence was stipulated to in the pretrial order [Tr. of R. 27-29], and is not disputed herein. (App. Br. p. 3.) It would seem hard, therefore, to find prejudice resulting from the alleged error. This point was well-stated in *Madokoro v. Del Guercio*, 160 F. 2d 164, 167 (9 Cir., 1947):

"We think it unnecessary to determine whether there was here a denial of due process, for all the facts elicited from the appellant at the Fort Lincoln hearing relevant to the deportation of such an alien

are admitted to be true. Failure to have counsel, if error, like other errors, may not be prejudicial. If there be a presumption that the denial of due process is presumed prejudicial, that presumption is overcome by appellant's admissions here. *Cf. Davis v. Texas*, 139 U. S. 651."

Appellant contends he next was deprived of counsel when a hearing took place in his absence after Mr. Tasoff had withdrawn from the case, and "a fortiori, he did not have the opportunity to seek other counsel." If appellant refers to the hearing of May 23, 1955 as being the one which took place in his absence, the error indeed would be harmless as nothing occurred on that date. In any event, appellant would appear to have had ample opportunity to consult with and obtain counsel even prior to May 23, 1955.

First, the decision of July 1, 1955 had appended to it Exhibit 12, a letter written May 13, 1955 by Mr. Tasoff, which notes that a copy was sent to appellant. The letter states in part:

"You are hereby advised that I am withdrawing as the attorney for Mr. Alesi . . . and I have informed him several times in the past to secure other counsel if that is his desire."

Moreover, appellant admitted at the trial that Mr. Tasoff had told him that he was no longer his attorney, and apparently was so told before May 23, 1955. [R. T. 7.] Thus the lack of counsel at the May 23, 1955 "hearing", apparently was the fault only of the appellant.

If appellant refers to the decision of July 1, 1955 as being the hearing which took place in his absence when

he was unable to secure counsel, even more revealing facts are present. Appellant testified at the trial that he had notice of the July 1, 1955 proceeding [R. T. 9], but has never offered any reason why he did not obtain or could not have obtained counsel to represent him then. Therefore, there does not appear to be the slightest basis for the allegation that appellant was deprived of counsel.

III.

Substantiality of Evidence.

No contention is made that the evidence introduced at the March 10, 1955 hearing is, *per se*, insufficient. Instead, it is contended that the hearing was unfair, and that this being so, any evidence admitted therein was done so improperly, and thus there was no evidence at all. Inasmuch as appellee's arguments concerning the fairness of the hearing have already been set forth, they will not herein be repeated.

Conclusion.

No error appears in the administrative proceedings below. The alien was given a reasonable opportunity to appear at all stages of the proceedings, together with counsel of his choice. In any event, it has not even been argued by appellant that any prejudice resulted from the alleged errors. It is well-established that procedural errors in administrative proceedings which do not result in prejudice are to be disregarded.

Bilokumsky v. Tod, 263 U. S. 149, 157 (1922);

Couto v. Shaughnessy, 218 F. 2d 758 (C. A. 2, 1955);

Bufalino v. Irvine, 103 F. 2d 830 (10 Cir., 1939);

Singh v. Carr, 88 F. 2d 672, 678 (9 Cir., 1937);
Reynolds v. United States, 68 F. 2d 346 (7 Cir.,
1934).

Consequently, the judgment of the District Court
should be affirmed.

Respectfully submitted,

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Chief of Civil Division,

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Attorneys for Appellee.

No. 15552

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIRST WESTERN SAVINGS AND LOAN ASSOCIATION and
SILVER STATE SAVINGS AND LOAN ASSOCIATION,

Appellants,

vs.

MAE ANDERSON, Trustee of the Estate of Rose Holding
Corporation, and GORDON L. HAWKINS,

Appellees.

Appeal From the United States District Court for the
District of Nevada.

APPELLANTS' BRIEF.

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FILED

AUG - 2 1957

PAUL P. O'BRIEN, CLERK



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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FIRST WESTERN SAVINGS AND LOAN ASSOCIATION and
SILVER STATE SAVINGS AND LOAN ASSOCIATION,
Appellants,
vs.

MAE ANDERSON, Trustee of the Estate of Rose Holding
Corporation, and GORDON L. HAWKINS,
Appellees.

**Appeal From the United States District Court for the
District of Nevada.**

APPELLANTS' BRIEF.

Jurisdiction.

Jurisdiction of the District Court in this proceeding is based on Chapter X of the Bankruptcy Act (11 U. S. C. A. 501-676), the debtor having filed a voluntary petition for reorganization under the provisions of said chapter.

Jurisdiction of this Court on appeal is based upon Section 250 of the Bankruptcy Act (11 U. S. C. A. 650). The appeal is from an order making allowances of compensation to the trustee and the attorney for the trustee and making such allowances a first lien upon all the property of the debtor.

Statement of the Case.

The debtor filed a voluntary petition under Chapter X of the Bankruptcy Act in the United States District Court for the District of Nevada, on May 3, 1956 [Tr. Vol. I, p. 1, line 1, to p. 13, line 10]. On the same day the said Court approved *ex parte* the said petition [Tr. Vol. I, p. 14, line 1, to p. 25, line 14].

The debtor had no money at all [Tr. Vol. II, p. 17, lines 8-11; Vol. I, p. 11, lines 4-8]. There were no corporate books or records, the debtor having been run by one man who operated several corporations and transferred property from one to the other [Tr. Vol. I, p. 40, lines 8-13]. According to the petition for reorganization, the sole assets of the debtor were a shopping center and two unimproved lots [Tr. Vol. I, p. 11, lines 4-8]. The shopping center had not been completed and lacked plumbing, cooling and heating, and had no septic tank [Tr. Vol. II, p. 11, lines 14-20; p. 14, lines 3, 4]. The roof had not been completed [Tr. Vol. I, p. 46, lines 14-16]. There were seven mechanics' liens filed against it [Tr. Vol. I, p. 3, line 22, to p. 4, line 4].

The debtor became owner of record of the shopping center on May 21, 1956, the day before the petition for reorganization was filed [Tr. Vol. II, p. 56, line 3, to p. 57, line 9].

At the time of the filing of the debtor's petition, appellant Silver State Savings and Loan Association held a first deed of trust on the shopping center. The deed of trust secured a note in the unpaid principal amount of \$96,331.00, with interest from November 1, 1955. A trustee's sale of the shopping center had been scheduled to take place on May 4, 1956, by reason of the debtor's default in payment [Tr. Vol. I, p. 4, lines 5-11].

Although on several occasions the Court below stated that no plan of reorganization appeared possible [Tr. Vol. II, p. 14, lines 5-7; p. 15, lines 4-6; p. 62, lines 5-9; p. 65, lines 19-20], it granted two lengthy extensions of time to the trustee to file a plan of reorganization [Tr. Vol. II, p. 78, lines 19-23; p. 84, lines 15-19; p. 103, lines 11-14]. These extensions were granted over the objections of appellants [Tr. Vol. II, p. 77, lines 6-9; p. 87, line 3, to p. 88, line 17], and upon representations of the trustee that a plan was likely to be filed [Tr. Vol. II, p. 84, line 24, to p. 85, line 1]. No plan of any kind was ever filed or submitted [Tr. Vol. II, p. 150, lines 19-21; Vol. I, p. 97, lines 7, 8].

On January 20, 1957, the Court denied the Motion of appellant Silver State Savings and Loan Association to vacate the order approving the debtor's petition [Tr. Vol. II, p. 106, lines 11-17].

By order dated March 29, 1957, the Court below awarded the trustee an allowance in the sum of \$5,000.00, and her attorney an allowance in the sum of \$2,500.00, and made the allowances a first lien on all the property of the debtor [Tr. Vol. I, p. 99, line 21, to p. 100, line 5]. The Court below refused to allocate the lien to any specific property of the debtor [Tr. Vol. II, p. 167, line 21, to p. 168, line 14].

Thereafter, and on May 7, 1957, a Petition for Leave to Appeal and Brief in support thereof was filed in this Court. On May 14, 1957, an order was entered allowing the said appeal [Tr. Vol. I, p. 111, lines 1-20]. On May 25, 1957, a Motion for Leave to File Typewritten Transcripts was filed, and by letter dated May 27, 1957, appellants were advised that an order of approval had been endorsed on the said motion.

Specification of Errors.

1. The Court below erred in making the allowances to the trustee and the attorney for the trustee a first lien upon the real property of the debtor.

2. The Court below erred in awarding unreasonable allowances to the trustees and to the attorney for the trustee.

Summary of Argument.

The allowances to a trustee and her attorney in an abortive Chapter X reorganization proceeding should not be made a lien superior to that of secured lienholders on real property having no equity, particularly where the proceedings were delayed due to requests of the trustee, who never formulated or presented any plan of reorganization, but rather attempted unsuccessfully to sell the assets, the debtor was hopelessly insolvent, the secured lienholders objected to the proceedings, and the security of the lienholders was impaired during the pendency of the proceedings due to the fault of the trustee.

If, nevertheless, the allowances were validly made a prior lien, then the allowances of \$5,000.00 to the trustee and \$2,500.00 to the trustee's attorney were not "reasonable."

ARGUMENT.

I.

Administration Expenses in an Abortive Reorganization Proceeding Should Not Be Made a Lien on a Debtor's Real Property Superior to That of a Holder of a Trust Deed Thereon.

There appears to be no precise authority in this Circuit on the issue here presented. However, in *In re Williams Estate*, 156 Fed. 934, 939 (1907), this Court held that the general costs of the administration of a bankrupt estate, such as the general fees of the trustee and his attorney, were not payable out of the proceeds of a sale of liened property, where the proceeds of the sale were less than the amounts of the liens. The Court there said that the proceeds

“ . . . are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of *Stewart v. Platt*, 101 U. S. 731, 739, 25 L. Ed. 816; *In re Utt*, 105 Fed. 754, 45 C. C. A. 32; *In re Prince & Walter (D. C.)*, 131 Fed. 546, 552; *In re Bourlier Cornice & Roofing Co. (D. C.)*, 133 Fed. 958, 963; *Loveland on Bankruptcy* (3d Ed.), p. 775. See, also, *Collier on Bankruptcy* (6th Ed.), p. 497.”

In *Duparquet v. Evans*, 80 L. Ed. 591, 595, 297 U. S. 216, 222, 223, the Supreme Court stated that under 77B of the Bankruptcy Act, "at times the holder of the lien may have his security modified or reduced by the plan of reorganization *when finally approved*" (emphasis supplied). As authority therefor the Court cited *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 585, 79 L. Ed. 1593, 1602; 97 A. L. R. 1106; and *Continental Illinois National Bank & T. Co. v. Chicago, R. I. & P. R. Co.*, 294 U. S. 675-677, 79 L. Ed. 1127-1129.

In the *Louisville* case, the Supreme Court struck down on due process grounds provisions of the Bankruptcy Act which affected the rights of mortgagees. In its decision, the Court after tracing some of the history of the Bankruptcy Act, said as follows (295 U. S. at 583, 79 L. Ed. at 1601):

"No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lien holders. In *Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595, where, in a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act, the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this Court said: 'The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledges. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of

an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy, *Straton v. New*, 283 U. S. 318, 321, 75 L. Ed. 1060, 1088, 51 S. Ct. 465, 17 Am. Bank. Rep. (N. S.) 630, and cases cited.' (29 U. S. 676, 677.) 'The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy.' (294 U. S. 681.)"

The *Duparquet* decision, *supra*, has been held by the Seventh Circuit to preclude the very action taken by the Court below in the case at bar. In the case of *In re Freeport Standard Dairy Corporation*, 124 F. 2d 783, 784, the Court of Appeals for that circuit affirmed a district court's refusal to make fees of a trustee and his attorney a lien prior to that of a mortgage lien where no plan of reorganization has been filed.

"The only question presented in this summary appeal is whether or not the District Court erred in refusing to subject the mortgaged real estate to the payment of the compensation allowed for the services of the trustee, his attorney, and the attorney for the debtor in the reorganization proceedings.

" . . .

"In considering this precise question under 77B, 11 U. S. C. A. §207, proceedings, this Court said: 'Duparquet Co. v. Evans, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591, seems to leave no doubt that a mortgage lien may not be impaired in a 77B proceeding before a final plan of reorganization has been approved.' *In re Forty-One Thirty-Six Wilcox Bldg. Corporation*, 7 Cir., 100 F. 2d 588, 593.

"See, also, *Louisville Title Mortgage Company v. Louisville Storage Company*, 6 Cir., 93 F. 2d 1008.

affirming *In re Louisville Storage Company*, D. C., 21 F. Supp. 897; 8 C. J. S. Bankruptcy §872.

“The Chandler Act, providing a complete method of procedure in the reorganization of corporations in bankruptcy, has not changed this rule.”

And in 1946, the Seventh Circuit, in the case of *In re Sheridan View Bldg. Corporation*, 154 F. 2d 1008, 1009, quoting from *In re Forty-One Thirty-Six Wilcox Bldg. Corp.* (7 Cir.), 100 F. 2d 588, said:

“‘We are forced to conclude in view of such authorities that a court is without right to allow fees or expenses except where they have been earned or incurred in connection with the formation of a plan of reorganization which has been theoretically at least, of benefit to all parties in interest.’”

The Second Circuit has had occasion to consider the point here involved. *In re Franklin Garden Apartments*, 124 F. 2d 451, 454, was a reorganization proceeding in which the mortgagee had taken possession of the corporate debtor's property under the terms of the mortgage which provided for the assignment of rents in case of default. In authorizing the use of the rentals by the trustee to pay current operating expenses only and not administration expenses, the Court said:

“... there seems no justification for allowing them at the present time, or indeed for allowing them at any time, out of the security belonging to the mortgagee, except insofar as the mortgaged property has received benefit through the proceeding (*Randolph v. Scruggs*, 190 U. S. 533, 23 S. Ct. 710, 47 L. Ed. 1165; *In re Centralia Refining Co.*, D. C. Ill., 35 F. Supp. 599, 602), or the mortgagee's rights are fully secured.’”

The *Centralia* case quoted by the Second Circuit in the *Franklin* case, is similar to the instant case. The debtor petitioned for reorganization. Its petition was approved and a trustee appointed. No plan was approved and the corporation was adjudged a bankrupt. The Court there held that administration expenses were not chargeable against the liened property, saying at 35 F. Supp. 599, 602, the following:

“I am aware that this decision will work hardship upon innocent officers and appointees of the Court in the reorganization proceedings. This is to be regretted but there seems to be no lawful alternative. It must stand as warning to court, counsel and litigants to use care to avoid instituting corporate reorganization proceedings without the consent of the secured creditors in cases in which the available free assets or income are insufficient to meet the necessary costs of administration in event reorganization fails. Good faith in filing the petition is directly involved in such circumstances. I know of no valid reasons for a law which would permit the expenses of an abortive reorganization proceeding to be visited upon the holder of a valid pre-existing lien without his consent or fault.”

Even if there were no authorities on the issue here presented, it would most obviously be an injustice under the facts of this case to charge petitioners with the administration expenses resulting from the reorganization proceeding. The petitioners loaned money and received notes secured by deeds of trust on real property. Title to the shopping center was recorded in the name of the debtor the day before the petition was filed [Tr. Vol. 11, p. 56, line 21, to p. 57, line 9]. This was undoubtedly done for the purpose of hindering the petitioner Silver State Sav-

ings and Loan Association. Reorganizations are not for such purpose. *Provident Mutual Life Ins. Co. v. University Church* (C. A. 9), 90 F. 2d 992; *White v. Penelas Mining Co.* (C. A. 9), 105 F. 2d 725. Nor should property be acquired for the purpose of filing a petition. *In re Francfair*, 13 F. Supp. 513; *In re Hudson Coal Co.*, 22 F. Supp. 768.

Despite the efforts of petitioners to have the proceedings dismissed [Tr. Vol. II, p. 77, lines 6-9; p. 100, line 8, to p. 101, line 22; p. 106, lines 11-17], the trustee and her attorney kept the proceedings going [Tr. Vol. II, p. 78, lines 19-23; p. 84, lines 15-19; p. 84, line 24, to p. 85, line 1].

The debtor was hopelessly insolvent. According to the report filed by the trustee on March 14, 1957, stating why no plan was filed, she said that with respect to the shopping center the "face value of said Trust Deed exceeds the value of the property" [Tr. Vol. I, p. 96, lines 9-15] and "the other property owned by the corporation in Clark County in general had First Trust Deeds of a great deal more value than their sales prices" [Tr. Vol. I, p. 96, line 25, to p. 97, line 2].

The Trustee stated in her report under Section 167(1) that the debtor was "apparently operated almost exclusively by Louis T. Davidson, who also operated several other corporations in the area. He caused transfers of property from one to the other, negotiated loans and in general ran the corporation out of his pocket. He apparently had no official capacity as director or officer of the debtor" [Tr. Vol. I, p. 40, lines 8-13]. (Mr. Davidson was never examined nor even subpoenaed.)

It is incomprehensible to believe that such a debtor could be reorganized, particularly as its business, according to

its petition, was “the business of investments and real estate development” [Tr. Vol. I, p. 1, lines 23, 24].

Even the District Court recognized during the course of the proceedings that a plan of reorganization was not likely to be formulated [Tr. Vol. II, p. 14, lines 5-7; p. 15, lines 4-6; p. 62, lines 5-9; p. 65, lines 19-20]. And even though the Court below at each session stated that it would adjudicate the debtor a bankrupt if no plan was presented by the next session [Tr. Vol. II, p. 16, line 25, to p. 17, line 3; p. 80, line 20-22], it nevertheless granted two extensions to the trustee [Tr. Vol. II, p. 78, lines 19-23; p. 84, lines 15-19]. The Court did so, despite stating that it doubted the good faith of the petition and would never have approved it if he had known the facts [Tr. Vol. II, p. 62, lines 5-11]. The last extension granted was on the sole ground that only the petitioners would benefit if no extension was granted and the unsecured creditors would realize nothing [Tr. Vol. II, p. 102, line 19, to p. 103, line 7], and despite the objection that the estate was depreciating in value [Tr. Vol. II, p. 87, lines 3-20]. In this regard the trustee reported that the floors of the shopping center offices were damaged during a rainstorm because the roof had not been completed [Tr. Vol. I, p. 46, lines 14-16] and she apparently took no steps to prevent such damage.

If under the facts of this case, secured lienholders are charged with the allowances made by reason of the abortive proceeding, what good is a mortgage or a deed of trust? Would any lender be willing to lend money on the security of a mortgage or deed of trust if the lender may have to foot the bill for an abortive reorganization proceeding?

And if the allowances granted could properly be made first liens on the debtor's property, upon which property should they be liens? Aside from the liens of appellants, one Tommie Yarbrough holds a note securing a deed of trust on two lots [Tr. Vol. I, p. 27, lines 16-20]. In addition, there are seven mechanic's liens [Tr. Vol. I, p. 3, line 22, to p. 4, line 4]. Although the Court below was asked about this point, it refused to rule thereon.

"Court: What I mean is all the liens are to be charged with the obligation to pay these allowances, and these are to be a priority over all the property.

Mr. Lionel: There are several pieces.

Court: On all the property.

Mr. Lionel: Well how do you apportion it?

Court: I don't know. Work that out. That is all I can do.

Mr. Lionel: May I take an objection?

Court: Yes.

Mr. Lionel: This is intended to be prior to any liens?

Court: This is to be a first lien on all property in this estate, and prior to any other liens on this property.

Mr. Lionel: Even—

Court: In other words, I want these allowances paid. That is my point.

Mr. Lionel: You mean even to property which may not be within the jurisdiction.

Court: You will have to look at the law." [Tr. Vol. II, p. 167, line 21, to p. 168, line 14.]

The petitioners are institutions lending the money of its investors. Its loans are secured by deeds of trust on real property. Surely, this security should not be impaired by making allowances of a proceeding of this nature prior liens.

II.

The Allowances Awarded to the Trustee and Her Attorney Were Not Reasonable.

Only if this Honorable Court holds that the administration allowances were properly made prior liens is this portion of the Argument material.

Section 241 of the Bankruptcy Act (11 U. S. C. 641) provides that the judge may allow “. . . reasonable compensation for services rendered . . . by the trustee and other officers, and the attorney for any of them.”

This Court, in the case of *In re American Line, Ltd.*, 115 F. 2d 196, 198, stated that “the allowance is required to be ‘reasonable’.” And see *In re Mortgage Guaranty Co.*, 40 F. Supp. 226, 230. Reorganization proceedings should, consistent with the policy of Congress, be economically administered. *Callaghan v. Reconstruction Finance Corp.*, 297 U. S. 464, 80 L. Ed. 804; *Stark v. Woods Bros. Corporation*, 109 F. 2d 969, 973; *Silver v. Scullin Steel Co.*, 98 F. 2d 503, 505. In *Straus v. Baker*, 87 F. 2d 401, 407, the Fifth Circuit said that:

“ . . . all allowances should be made bearing in mind the spirit and purpose of the bankruptcy statutes, to keep administration costs to the lowest reasonable levels.”

The tendency with respect to allowances in reorganization proceedings should always be towards moderation rather than liberality. *In re Tom Moore Distillery Co.*, 32 F. Supp. 382, 385; *In re Mortgage Guarantee Co.*, 40 F. Supp. 226, 230. Allowances should not be paid on the same scale as paid to those in private employment. *Finn v.*

Childs, 181 F. 2d 431, 435, 436; *Stark v. Woods Bros. Corporation*, 109 F. 2d 969, 973. Trustees and their attorneys are officers of the court and public servants, and their compensation should never be as large as those engaged in private employment. *In re National Department Stores*, 11 F. Supp. 633, 637, 638; *In re McGrath Mfg. Co.*, 95 F. Supp. 825, 829; *In re Arcturas Radio Tube Co.*, 35 F. Supp. 783, 785.

In considering whether an allowance is "reasonable," numerous criteria have been laid down by the courts. Some of these criteria are the value of the debtor's estate (*In re Pejepscot Paper Co.*, 35 F. Supp. 693, 695); the amount available for allowances (*In re Columbia Ribbon Co.*, 117 F. 2d 999, 1003; *In re Tom Moore Distillery Co.*, 32 F. Supp. 382, 385), the character and extent of the particular services (*In re Mortgage Guaranty Co.*, 40 F. Supp. 226, 230; *In re Pejepscot Paper Co.*, *supra*), the experience and skill required and exercised (*In re Pejepscot Paper Co.*, *supra*; *In re McGrath Mfg. Co.*, 95 F. Supp. 825, 829) and the results finally achieved (*In re Mortgage Guaranty Co.*, *supra*; *In re Pejepscot Paper Co.*, *supra*).

All of the cases cited in the preceding paragraph, with the exception of *In re Columbia Ribbon Co.*, were cases in which there was a reorganization. It would appear that by *a fortiori* reasoning the criteria should be applicable where no reorganization has been effected. In the *Columbia Ribbon* case, the Third Circuit said:

"We think, however, in making such allowances in a proceeding where reorganization has failed, the court should fix the amount of the allowances in the light of the fund available for administration expenses and of other claims upon that fund."

In this circuit, in the case of *In re Barecloux*, 74 F. 2d 288, 294, the Court laid down the following rule with respect to an attorney's fee in a bankruptcy:

"In determining a reasonable fee for the services rendered by the attorneys, it was necessary to consider the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results achieved, the opinion evidence touching the reasonableness of the fee, and the economical spirit of the Bankruptcy Act itself."

In *Dec v. United Exchange Bldg., Inc.*, 88 F. 2d 372, 374, this Court said that the rule enunciated in the *Barecloux* case applied to a trustee's attorney and a reorganization manager. As the trustee's attorney and the trustee are awarded allowances under the same section of the Bankruptcy Act (Sec. 241, 11 U. S. C. 641), the rule undoubtedly was intended to apply also to the trustee's allowance.

Applying the rule of the *Barecloux* case to the allowances made to the trustee and her attorney, it will be readily seen that the allowances were not "reasonable."

In her application for fees, the trustee stated as follows:

"Upon the appointment and qualification of your petitioner as Trustee she made a survey of the debtors property and its operation from which it appeared that said debtor owned certain real property within the County of Clark, State of Nevada, including one incomplete shopping center and several unimproved parcels of land; that the debtor corporation had never been in operation as a going concern, and that the property values did not exceed the debts of the said corporation. That your petitioner reported the results of her investigation in a report dated July 6,

1956, and filed in the above entitled court on the said date. It was very difficult to get any information concerning the property and activities of the debtor, since no books existed your petitioner interview Lindsey Jacobsen, who was alleged to be the accountant and McDonald and Denton, attorneys for the debtor. The operator of the debtor, Lou Davidson, was unavailable and in fact was indicted by the Federal Grand Jury during the period of the estate. The records of Clark County were finally resorted to, to determine interests in property. Your petitioner spent at least one hundred (100) hours to discover and prepare this report." [Tr. Vol. I; p. 82, lines 2-21.]

In addition, the debtor had no money [Tr. Vol. II, p. 17, lines 10, 11].

It is difficult to understand how the trustee ever expected to reorganize the debtor in view of the situation. And yet she secured two extensions of time in which to file a plan, which extensions consumed a five month period [Tr. Vol. II, p. 78, lines 19-23; Vol. II, p. 84, lines 15-19; p. 84, line 24, to p. 85, line 1].

Actually the trustee spent no time trying to reorganize the debtor, but rather spent her time trying to sell the shopping center.

"Q. Did you say you spent considerable time trying to sell those stores? A. Yes.

Q. About what percentage of your time would you say you spent for such a purpose? A. Well as I say, I spent full time from the time I was appointed until August and after that I believe part time. Perhaps I should say more than that actually.

Q. I see. And that was all trying to sell the premises. A. Not necessarily trying to sell them.

Actually calls, checking records—calls and various things, not only trying to sell the stores.

Q. Would you just tell me exactly what you did in attempting to reorganize the corporation? A. Well I have sent out all the notices. I have done anything that I assume any other Trustee would do under the same circumstances I have been placed in would do without any funds to operate with.

Q. You mean by that you have tried— A. In other words, I feel that if the first petition had of been granted I feel that the shopping center would have been occupied and rented if it had been completed.

Q. Did you ever formulate or draft any possible plan of reorganization? A. No.” [Tr. Vol. II, p. 149, line 22, to p. 150, line 21.]

Actually the trustee's attempts to sell were made primarily through other real estate people [Tr. Vol. II, p. 139, lines 19-22]. In addition, she spent “considerable” time trying to sell some property in which she “assumed” the debtor had an “interest” [Tr. Vol. I, p. 77, line 22, to p. 78, line 1] and “considerable” time trying to sell two lots which the debtor had transferred three months before its petition was filed [Tr. Vol. I, p. 78, lines 10-17].

The trustee never corresponded with the stockholders, other than to send them monthly notices. She never wrote them to see if they were interested in reorganizing the debtor [Tr. Vol. II, p. 153, lines 1-15]. She never asked her attorney to subpoena them or Louis Davidson who ran the corporation and juggled its property [Tr. Vol. II, p. 153, line 16, to p. 154, line 8].

In her application for allowances, the trustee stated that she collected a total of \$1,225.42 and expended \$1,231.86

[Tr. Vol. I, p. 83, lines 21-24]. \$388.84 of the expenditures were paid by the trustee to herself [Tr. Vol. I, p. 102, lines 17-20].

Prior to being appointed trustee, Mrs. Anderson worked for someone in the real estate business [Tr. Vol. II, p. 141, lines 3-5]. She testified her income in 1955 would be close to \$5,000.00 [Tr. Vol. II, p. 142, lines 24, 25]. In her application, she asked for an allowance of \$10,000.00 [Tr. Vol. I, p. 86, lines 14-16].

There was no opinion evidence offered as to the value of the evidence of the trustee. In this regard, it should be noted that the burden of proving the worth of services under the Bankruptcy Act is on the claimant. *Woods v. City National Bank & Trust Co. of Chicago*, 312 U. S. 262, 267, 268, 85 L. Ed. 820, 825.

With respect to the attorney for the trustee, it should be noted that he testified as follows:

“Q. Do you feel bankruptcy matters are more involved than the average legal matters that you might be consulted upon? A. As far as I was concerned it was. Bankruptcy, especially this reorganization proceeding is practically a new field for me. . . .”
[Tr. Vol. II, p. 160, lines 11-16.]

In his petition for allowances, the attorney sets forth 76½ hours of services. He asked for an allowance of \$4,000.00 [Tr. Vol. I, p. 89, line 1, to p. 94, line 11]. The allowance of \$2,500.00 awarded compensates him at the rate of more than \$32.00 per hour.

This hourly rate can hardly be deemed a “reasonable” one for an attorney without experience in reorganization practice (*In re Pejepsco Paper Co.*, 35 F. Supp. 693, 695) handling a non-intricate matter (*In re Mortgage*

Guaranty Co., 40 F. Supp. 226, 230), and where the allowance should be less than that received for the same services in private employment (*Finn v. Childs*, 181 F. 2d 431, 435, 436).

Despite bankruptcy being a new field to the attorney, the petition does not specifically show any research time, although there is a statement in the petition that \$6.25 was spent on research and to subpoena one witness, and the attorney had been reimbursed therefor [Tr. Vol. I, p. 93, lines 22-24].

Five (5) hours are shown as spent in a conference and preparation of a letter demanding back rent, as a result of which \$200.00 was paid to the trustee [Tr. Vol. I, p. 92, lines 5-10]. At \$32.00 an hour, this means that it cost the estate \$160.00 to collect the \$200.00. Is such a fee "reasonable?" Does it not violate the economical spirit of the Bankruptcy Act? And these services are the only services claimed by the attorney to have been performed in connection with the operation and management of the debtors property [Tr. Vol. I, p. 92, lines 3-10].

The petition of the attorney claims twenty (20) hours spent in consultation and preparing of the trustee's monthly reports [Tr. Vol. I, p. 93, lines 13-17]. At \$32.00 per hour, the attorney is receiving \$640.00 for his services with respect to reports that the trustee has been awarded a considerable sum to prepare. In her application for allowances, the trustee stated that she prepared the monthly reports [Tr. Vol. I, p. 84, line 25, to p. 85, line 2].

In his petition, the attorney for the trustee stated that he "prepared a list of creditors and stockholders and the Trustee's Report under Section 167 (1)" [Tr. Vol. I, p. 90, lines 15-18]. In the trustee's application, she stated that she "prepared and filed her report under Section

167 (1),” and “prepared and filed a list of creditors and stockholders [Tr. Vol. I, p. 84, lines 20-23]. Surely only the trustee or her attorney performed these services, and only one and not both should be compensated therefor.

There was no opinion evidence offered as to the value of the services of the attorney for the trustee.

Applying the rule of the *Barecloux* case to the allowances made, it will be seen that numerous criteria have been ignored. Certainly there were no intricate questions involved. The estate was almost non-existent by reason of the fact that there was no equity in any property. There were no assets of any kind other than the property, only one piece of which had improvements. Only \$1,225.42 was collected by the trustee. The opposition encountered was solely the efforts of the petitioners to have the proceedings dismissed. There were no results achieved.

Manifestly the economic spirit of the Bankruptcy Act was violated in awarding the allowances totalling \$7,500.00 to the trustee and her attorney, especially as there were no funds available therefor (*In re Columbia Ribbon Co.*, 117 F. 2d 993, 1003) and they were made liens prior to the secured liens of the petitioners.

It is submitted that the allowances to the trustee and her attorney were not “reasonable” within the meaning of Section 241 of the Bankruptcy Act (11 U. S. C. 641).

Conclusion.

For the reasons stated herein, the appellants respectfully pray that the order of the court below making the allowances a prior lien on debtor’s property be reversed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Appellants.



No. 15552

IN THE

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Appellants,

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MAE ANDERSON, Trustee of the Estate of ROSE HOLDING
CORPORATION, and GORDON L. HAWKINS,
Appellees.

Appeal From the United States District Court for the
District of Nevada.

APPELLEES' ANSWERING BRIEF.

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APPELLEES' ANSWERING BRIEF.

Summary of Argument.

The District Court was justified in making the allowances to the Trustee and her Attorney first liens on the secured debtor's property. The District Court did not abuse its discretion in setting the amount of the fees and allowances.

ARGUMENT.

I.

The Trial Court Did Not Err in Making the Allowances to Trustee and Her Attorney First Liens on All the Property of the Debtor Even Though No Reorganization Was Effected.

The majority of the cases cited by Appellants were decided under Section 77-B of the Bankruptcy Act or were decided since 1938 (the year Chapter X was enacted) by applying the rule under the old Section 77-B without reference to the 1938 enactment.

Section 246 of the Bankruptcy Act (11 U. S. C. A. 646) reads as follows:

“Upon the dismissal of a proceeding under this chapter, or the entry of an order adjudging the debtor a bankrupt, the judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such proceeding prior to such dismissal or order of adjudication by any persons entitled thereto, as provided in this chapter, and shall make provisions for the payment thereof, and for the payment of all proper costs and expenses incurred by officers in such proceedings.”

There is no comparable provision in the old Section 77-B. (6 Collier's on Bankruptcy 4575; see also *In re Old Algiers, Inc.*, 100 F. 2d 374.)

The distinction caused by the amendment of the Bankruptcy Act was recognized by the Court in *In re Centralia*

Refining Co., 35 Fed. Supp. 599 at 602, where the Court said:

“In the case before the court the referee has made findings as to the expenses that were incurred for the preservation, protection and benefit of the liened property and charged the liened property with them.”

The referee did not make such findings as to the allowances. The Court held this was not error. However, in the instant case the Trial Court specifically held [Tr. Vol. I, p. 99] that:

“ . . . it is found that the services rendered by Mae Anderson, Trustee, and Gordon L. Hawkins, Esq., her Attorney, were rendered for the preservation, protection and benefit of all of the Debtor's property, including that which is subject to liens of first trust deeds and mechanics' liens; . . . ”

The Third Circuit Court of Appeals held in a recent case that the administrative expenses could be visited upon mortgaged property in the *Matter of Riddlesburg Mining Company, Inc., Debtor*, 224 F. 2d 834 at 837, saying:

“Section 246 . . . gives the judge authority to allow reasonable compensation for administration expenses incurred during a reorganization attempt. There is no limitation with regard to secured or unsecured assets. Whether, and to what degree, the mortgage creditors should run a risk of loss in order to make possible a reorganization was wholly within the discretion of the district judge, who properly exercised his discretion.”

See also:

In re Chapman Coat Co., 196 F. 2d 799;

In re Rice Leghorn Farm, Inc., 113 Fed. Supp. 903.

In the instant case, the main difficulty in presenting a plan for reorganization was the act of Appellant Silver State Savings & Loan Association in selling the main asset of the estate in violation of the Court's Order of May 3, 1956 [Tr. Vol. I, pp. 14-25], after it had been served with a copy of the same [Tr. Vol. I, p. 267], and the Appellant's refusal to restore the property to the bankrupt estate, even though ordered by the Court [Vol. I, pp. 33, 37, 41, 45, 48, 57, 60, 64; Vol. II, pp. 24, 26-44, 47-78, 128-129].

The statement in Appellants' Brief to the effect that no plan of reorganization could be worked out is belied by the transcript. The first extension of the date for presenting a plan or reasons why a plan could not be effected was December 13, 1956 [Tr. Vol. II, p. 78], which was brought about by the Court's continuation of the contempt proceedings against Appellant Silver State Savings and Loan Association and the second was granted after a full hearing on January 7, 1957, when it appeared likely that a plan could be effected [Tr. Vol. II, pp. 82-103]. That the Court was justified is shown by the Appellant's own appraisal which indicated replacement value of \$124,000.00 with the face value of Appellant's Trust Deed at \$96,000.00 [Tr. Vol. II, p. 94, lines 20-23].

The allowances to Appellees were made first liens by the District Court under Section 246 of the Bankruptcy Act, and under the authorities he was so justified especially where the complaining creditor caused the most delay by its sale of property in violation of the Order and its refusal to restore the *status quo*.

II.

**The District Court Did Not Abuse Its Discretion in
Setting the Allowances.**

It is well and good for Appellants to cite the criteria of reasonableness of fees and allowances, but have failed to show this Honorable Court where they were not followed by the District Court in this case. The only matter concerning the Court in this appeal is whether the lower Court abused its discretion. (*In re Solar Mfg. Corp.*, 206 F. 2d 780; *Stein v. Hemker*, 157 F. 2d 740; *In re Barceloux*, 74 F. 2d 289.)

Appellants state the Trustee and her Attorney are being paid for duplicate services (Br. pp. 19 and 20). Apparently it believes only one person can prepare and file papers. All matters of preparation of reports were joint efforts requiring the time and ability of both the Trustee and her Attorney.

Appellants complain that there is no research time shown in the Attorney's Petition, but the Court need only be referred to Transcript Volume II, page 91, line 7, to page 92, line 1.

Conclusion.

For the reasons stated Appellees respectfully request that this Honorable Court affirm the Order of the Trial Court.

Respectfully submitted,

GORDON L. HAWKINS,

Attorneys for Appellees.



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APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

ARGUMENT.

Section 246 of the Bankruptcy Act Did Not Authorize
the Court Below to Make Allowances of the
Trustee and Her Attorney First Liens on Prop-
erty Subject to Appellants' Deeds of Trust.

Appellees argue that Section 246 of the Bankruptcy
Act (11 U. S. C. A. 646) has changed the rule that pre-
vailed prior to 1938.

There is nothing contained in Section 246 which au-
thorized the action taken by the District Court. While
the section authorized the Court to make provisions for
payment of reasonable allowances for services, it did not
authorize such allowances to be made prior liens.

Surely if the section was intended to change the law in the drastic manner contended by Appellees there would be some language specifically doing so, particularly in view of the numerous pre-1938 decisions holding that mortgage security could not be impaired to pay administration expenses prior to approval of a plan of reorganization, *i.e.*, *Duparquet Co. v. Evans*, 297 U. S. 216, 222, 223, 80 L. Ed. 591, 595; *In re Forty-one Thirty-six Wilcox Bldg. Corp.* (7 Cir.), 100 F. 2d 588, 595; *Louisville Title Mortgage Company v. Louisville Storage Company* (6 Cir.), 93 F. 2d 1008, affirming *In re Louisville Storage Company*, 21 Fed. Supp. 897; *Oakland Hotel Co. v. Crocker First National Bank of San Francisco* (9 Cir.), 85 F. 2d 959, 961. And see 8 C. J. S., *Bankruptcy*, Sec. 872.

It is noteworthy that the Commentary on the Chandler Act by former United States District Judge George E. Q. Johnson, the author of Johnson's Bankruptcy Reorganizations, contained at the beginning of 11 U. S. C. A., Secs. 501 to end, in the discussion of "Compensation and Allowances," says nothing about making administrative expenses of an abortive reorganization proceeding a prior lien on secured property of the debtor. Instead, the author states that under the Chandler Act compensation is allowed more extensively than under the old law and the decisions limiting such allowances. Manifestly, if Judge Johnson had any reason to believe that Section 246 had the effect of changing the law as enunciated in the cases above cited, he would have so commented.

In the case of *In re Freeport Standard Dairy Corporation*, 124 F. 2d 783, 784, a 1941 case, quoted on page 7 of Appellants' Opening Brief, the Seventh Circuit said that *Duparquet v. Evans*, 297 U. S. 216, 80 L. Ed. 591, left no doubt that a mortgage lien could not be impaired before

approval of a final plan of reorganization, and the Chandler Act did not change the rule.

In 1946, the same Court, in the case of *In re Sheridan View Bldg. Corporation*, 154 F. 2d 1008, 1009, reviewed the authorities and held it was without power to award fees or expenses except when incurred in connection with the formation of a plan of reorganization. That Court said that "Indeed we think this is generally accepted law."

The contention of the Appellees was apparently made in the case of *In re Centralia Refining Co.* (D. C. Ill.), 35 Fed. Supp. 599, 601, 602, quoted on page 9 of Appellants' Opening Brief. The Court there said that Section 246 had to be read together with Section 238 of the Bankruptcy Act (11 U. S. C. A. 638):*

"Reading sections 238 and 246 together it would appear that the provision which the court is required to make for the payment of costs and expenses incurred in the unsuccessful corporate reorganization proceeding must be governed by the principles which control the provision for the payment of costs and expenses of administration in regular bankruptcy proceedings."

The *Centralia* case was cited approvingly by the Second Circuit in 1941 in the case of *In re Franklin Garden Apartments*, 124 F. 2d 451, 454. In that case, the Court

*Section 238 pertinently provides as follows:

"Upon the entry of an order directing that bankruptcy be proceeded with—

"(1) . . . where the petition was filed under section 528 of this title, the proceeding shall thereafter be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication has been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved."

reversed an order which authorized the use of sixteen thousand dollars out of the rentals of the debtor's property covered by a mortgage to install a sprinkling system on the property. The Court, consisting of Justices Augustus Hand, Learned Hand and Clark, said as follows:

"We can see no equity, fairness or adequate protection of the mortgagee's rights in diverting rentals derived from the property covered by his mortgage (which became due in October, 1941) in order to build up an illusive equity. This is particularly the case where it is not certain that there will be any plan approved and that the mortgaged premises may not be sold in bankruptcy pursuant to Section 236, 11 U. S. C. A. §636, or the proceeding under Chapter X may not be dismissed.

"We think that the rentals may be used to pay current operating expenses of administration. While such expenses may hereafter be paid from rentals or other sources by virtue of Sections 241, 246 or 259 of the Chandler Act, 11 U. S. C. A. §§641, 646, 659, there seems no justification for allowing them at the present time, or indeed for allowing them at any time, out of the security belonging to the mortgagee, except insofar as the mortgaged property has received benefit through the proceeding (*Randolph v. Scruggs*, 190 U. S. 533, 23 S. Ct. 710, 47 L. Ed. 1165; *In re Centralia Refining Co.*, D. C. Ill., 35 F. Supp. 599, 602), or the mortgagee's rights are fully secured."

Appellees cite three cases as authority for its position: *Matter of Riddlesburg Mining, Inc., Debtor*, 224 F. 2d 834; *In re Chapman Coal Co.*, 196 F. 2d 779; and *In re Rice Leghorn Farm, Inc.*, 113 Fed. Supp. 903.

The *Chapman* case does not aid the Appellees, but instead supports the position of the Appellants. In that

case the appellant had liens on all the property of the debtor. The District Court entered an order permitting the debtor to continue operation of its mine and made the payment of wages and union welfare fund contributions a first and prior lien upon assets of the debtor. On appeal the Seventh Circuit said that the record on appeal did not contain a proper transcript of the hearing at which the Court below had entered its order continuing the debtor's operation of the mine and as the appellant had a lien on all the assets of the debtor, the Circuit Court was required to assume that the appellant had agreed to the entry of the order continuing the operation of the mine, otherwise the District Court would not have entered the order.

The clear implication of the decision is that if the appellant mortgagee had objected to the continuance of the debtor in possession, the Court would have been without power to make the wage and welfare payments a first and prior lien upon assets covered by appellant's mortgagees.

Appellants are also unable to perceive the reason for the citation of the *Rice Leghorn Farm* case by the Appellees. That case cites approvingly *In re Sheridan View Bldg. Corporation, supra*, and *In re Louisville Storage Company, supra*, and even though the secured creditor there approved an order made at its instance, directing the dismissal of the reorganization proceeding, which order recited that the trustee was to pay compensation for services rendered in the proceeding as may be fixed by the Court out of all funds then in or were to come into his hands, and the balance remaining was to constitute a first lien on the secured property, the Court nevertheless limited the allowances to the funds in the hands of the trustee.

The fees allowed by the Court in *Rice Leghorn Farm* were five thousand dollars each to the trustee and the

attorney for the trustee even though the value of the debtor's assets were in excess of four hundred thousand dollars and the trustee and his attorney "rendered invaluable service in a proceeding which was of tremendous benefit, according to the undisputed testimony, to the secured creditor." There the trustee took obsolete assets and operated the going concern at a profit and for the benefit of the secured creditor. Obviously then, there is no similarity between that case and the case at bar. If anything, it supports the contentions of the Appellants.

In re Riddlesburg Mining Company, supra, is the only case cited by Appellees which appears to support their position. However, Appellants believe that an examination of the decision therein will clearly indicate that it should not be entitled to any weight by this Court.

The sole reason given by the Fifth Circuit for its view is set forth in one short paragraph, which paragraph, except for the citation to Section 246, is set forth on page 3 of Appellees' Answering Brief. The reason given by the Court is solely Section 246. No other authority of any kind is cited. The Court did not consider any pre-1938 cases, nor did it consider any later cases. Surely such a holding can hardly be considered persuasive, particularly in view of the apparently unanimous holdings *contra* in the other circuits.*

*One possible reason for the brief holding in the case is the fact that the District Court had dismissed the reorganization proceeding, adjudicated the debtor a bankrupt, and retained jurisdiction over the debtor's property for the purpose of paying administration expenses incurred. There was no order making administration expenses a prior lien, and while the issue was raised on appeal, it was probably not strongly urged, because the Court, in the decision, reversed an order of the District Court disallowing interest on a second mortgage from the date of the petition on the ground that the allowance of interest was premature. It would therefore appear that there existed ample security to pay the mortgage debt.

In the *Riddlesburg* case, the Court sustained the finding of the lower court that the petition, which was filed by creditors, was filed in good faith.

In the instant case, the petition was filed by the debtor and approved *ex parte* on the same day. The debtor became the owner of the property the day before, and it was scheduled to be sold the day after the petition was filed.

A petition is not filed in good faith if "it is unreasonable to expect that a plan of reorganization can be effected" (11 U. S. C. A. 545), or for the purpose of hindering creditors (*Provident Mutual Life Ins. Co. v. University Church* (9 Cir.), 90 F. 2d 992; *White v. Penelas Mining Co.* (9 Cir.), 105 F. 2d 726), or property is acquired for purposes of filing a petition (*In re Francfair, Inc.*, 13 Fed. Supp. 513; *In re Hudson Coal Co.*, 22 Fed. Supp. 768).

The good faith required at the inception of a reorganization proceeding must continue throughout (*In re Dutch Woodcraft Shops*, 14 Fed. Supp. 467) and whenever want of good faith appears, the proceedings should be terminated and the proceedings dismissed (*First National Bank of Wellston v. Conway Road Estates Co.*, 94 F. 2d 736; *Magidson v. Duggan*, 212 F. 2d 748).

During the entire proceeding, commencing with the first hearing the District Court repeatedly stated that there was no possibility of reorganization, and further stated that bad faith existed.

"Court: I have an idea. My idea is—we might call it a doubt or fear that there will be difficulty in ever having a plan suggested." [Tr. Vol. II, p. 14, lines 5-7.]

“Court: . . . I don’t see any in sight. How long has it been in Court?”

Mr. Hawkins: A little over two months.

Court: And no one has come forward with any ideas for suggesting a plan?

Mr. Hawkins: Just the efforts of Mrs. Anderson.

Court: The trustee herself. But this creditor came into this Court. Why? If he came into this Court just to put his hand up and keep creditors away he will find he can’t do that. It isn’t to hold creditors at bay at all. It is just to hold them off long enough to give the corporation a chance to rehabilitate itself, if there is a possibility.

Mr. Hawkins: That was what the idea, the main idea of Mrs. Anderson was. That was the idea she had in attempting to put this thing in a position where it can be reorganized until the creditors—

Court: The Court is not inclined to lend itself and our assistance for that kind of thing. If the petitioners who petitioned this court, the debtor itself, came into this Court requesting the aid of this Court to give it an opportunity to organize, all right. The Court has gone that far. It has held everyone else in abeyance and also the efforts to satisfy claims of conveyance so that this can go on, but it is asking the Court a whole lot in asking its officers and the trustee or anyone else to reorganize the business. I wouldn’t be inclined to grant the petition. If the debtor—if there is no possibility of reorganizing, then this ought to be adjudicated in bankruptcy as quickly as possible. There is a question of good faith in this thing. Here is a debtor who petitioned this Court and hasn’t made a move, offered anything or made a suggestion or made any effort that the Court knows anything about to secure financial assistance.” [Tr. Vol. II, p. 15, line 6, to p. 16, line 12.]

“Court: . . . I am inclined to think it was a mistake by anyone to feel that this corporation could be reorganized. I think—I doubt the good faith of the petition from what I have seen here. If I had known as much about it as I do now I would never have approved the petition for reorganization and put the thing back into bankruptcy, where I think it ought to go mighty quick. . . .” [Tr. Vol. II, p. 62, lines 5-11.]

“Court: Isn’t it true there is no possibility of reorganizing or a Plan being submitted?” [Tr. Vol. II, p. 65, lines 19-20.]

It was obvious that the petition was filed in bad faith and for the sole purpose of hindering the Appellant Silver State Savings and Loan Association in realizing on its security. See *Oakland Hotel Co. v. Crocker First National Bank of San Francisco* (9 Cir.), 85 F. 2d 959, 961.

Appellees argue on pages 2 and 3 of their brief that *In re Centralia Refining Co.*, 35 Fed. Supp. 599, authorizes the lien, because the Court made a finding that the services of the trustee and her attorney were rendered for the preservation, protection and benefit of all the property of the debtor. Apparently the District Court felt that the case so held. [Tr. Vol. II, p. 166, lines 8-21.]

Appellants submit that the interpretation of Appellees and the Court below is not a proper one. In the *Centralia* case, the Court held that the costs of insurance, watchman, light and power were properly chargeable for the preservation of the secured property, but properly chargeable thereto. However, the Court very definitely held that fees of the trustee and attorney for trustee were not properly chargeable against the secured property.

And even assuming *arguendo* that the Appellees would be entitled to have their allowances charged to the property if their services were rendered for the preservation, protection and benefit of the property, except for the trustee hiring a merchant patrol for which she paid a total of \$367.50 out of rentals received [Tr. Vol. II, p. 123, line 25; Vol. I, p. 102, line 2], there is no evidence to support any finding that their services were rendered for such purposes. The trustee devoted almost all her time to trying to sell the shopping center. [Tr. Vol. II, p. 149, line 22, to p. 150, line 8.] And see her Summary of Services Rendered. [Tr. Vol. I, p. 81, line 12, to p. 86, line 7.] The attorney for the trustee obviously did not render his services for such purpose. [See his Summary of Services Rendered, Tr. Vol. I, p. 89, line 14, to p. 93, line 17.]

Appellees' statement on page 4 of their brief that the second extension of time to present a plan was granted when it appeared likely that a plan could be effected is without basis in fact. Only one witness testified at that hearing, Lloyd H. Skrenes, a real estate salesman, who testified that there was some vague possibility of selling the shopping center, but there was no concrete proposal, nor did he have any idea what the price might be. [Tr. Vol. II, p. 89, line 22, to p. 97, line 1.]

As for the appraisal referred to on page 4 by the Appellees, it is submitted that replacement value bears little or no relationship to actual value. Appellants wish to point out to the Court that the replacement value of \$124,000.00, referred to by Appellees, is in the record only because of a statement by the attorney for the trustee [Tr. Vol. II, p. 94, lines 16-23], and Appellants therefore respectfully take the liberty of advising

the Court that it was taken from an appraisal submitted by Appellant Silver State Savings and Loan Association as an exhibit to its motion to vacate the order approving the debtor's petition, and that the appraisal said the then current market value was only \$89,000.00.

To use the words of this Honorable Court in *Oakland Hotel Co. v. Crocker First National Bank of San Francisco*, 85 F. 2d 959, 961, "The only result of this proceeding was to defer the prosecution of the foreclosure proceeding." Appellants submit that not only was that the result, but the record clearly demonstrates that it was the sole purpose of the proceeding.

Appellants respectfully submit that the order of the court below making the allowances a prior lien on the debtor's property be reversed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Appellants.

No. 15563

United States
Court of Appeals
for the Ninth Circuit

J. G. SHOTWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington.
Northern Division.

FILED

AUG 21 1957

PAUL P. O'BRIEN, CLERK



No. 15563

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee.



United States District Court for the District
of Washington, Western District, Northern
Division

Civil Action No. 3826

J. G. SHOTWELL,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR FEDERAL TRANSPORTA-
TION TAX ERRONEOUSLY ASSESSED
AND COLLECTED

The Plaintiff, J. G. Shotwell, alleges as follows:

1. Plaintiff is and was at all times hereinafter mentioned an individual who is a citizen of the United States of America and whose present address is 5908 South East 20th Street, Mercer Island, Washington, former address, Umatilla, Oregon.

2. This action arises to recover taxes collected under Section 3475 of the Internal Revenue Code on the transportation of property, said taxes were collected by Hugh H. Earle as the Collector of Internal Revenue for the District of Oregon, Portland, Oregon; he is not now the Collector of Internal Revenue for the District of Oregon and he is now out of the said office. The amount involved exceeds \$3,000.00.

This Court has jurisdiction over this action under Section 1346 (a) (1) of the Judicial Code as amended (28 U.S.C. Sec. 1346 (a) (1)), and the United States of America is named Defendant in pursuance thereof.

3. July 29, 1948, the Department of the Army, the United States of America, contracted with the Plaintiff to move large quantities of coarse and fine aggregates to the McNary Dam, Umatilla, Oregon, to be used by the Government and to be incorporated in the McNary Dam. The coarse and fine aggregates were located on Berrian Island, Washington, which is a Government owned property five miles upstream from the McNary Dam site. A photostat copy of the contract is attached as Exhibit A.

4. The haul road from Berrian Island, Washington, to the McNary Dam site was on Government owned property and the Corps of Engineers, United States Army, in charge of the construction of the McNary Dam, determined Berrian Island and the haul road to be within the work area of the McNary Dam project. The aggregates moved from Berrian Island and deposited at the McNary Dam site were incorporated into the McNary Dam concrete structure.

A copy of a letter from the District Engineer, Corps of Engineers, United States Army, dated June 28, 1950, is attached as Exhibit B.

5. The Plaintiff secured Keith Williams to engage jointly with the Plaintiff in the movement of

the aggregates by use of equipment to be secured by Keith Williams for that purpose.

The Plaintiff paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the total amount of \$505,606.54 under a subcontract under the above-mentioned contract of July 29, 1948 (Exhibit A attached), for the movement of the aggregates from the Government owned property on Berrian Island over Government owned haul roads to the McNary Dam site in performance by Plaintiff under the contract of July 29, 1948.

6. The Collector of Internal Revenue assessed to the Plaintiff and the Plaintiff has paid to the said Collector of Internal Revenue during November and December, 1951, the sum of \$15,168.20 as federal transportation tax under Section 3475 of the Internal Revenue Code at 3 per cent on the above amount of \$505,606.54.

7. The work to be performed by the Plaintiff under his contract of July 29, 1948 (Exhibit A attached), and which was performed, did not constitute the movement of property from one point in the United States to another within the meaning of Section 3475 of the Internal Revenue Code.

8. The work performed by the said Keith Williams under the subcontract with the plaintiff did not constitute the movement of property from one point in the United States to another point within the meaning of Section 3475 of the Internal Revenue Code.

9. April 28, 1952, the Plaintiff filed with the Collector of Internal Revenue, District of Oregon, Portland, Oregon, a claim for refund of \$15,168.20 as an overpayment of the tax on transportation of property illegally assessed and collected in November and December, 1951.

A copy of the claim is attached as Exhibit C.

10. A period of more than six months has elapsed since the filing of the said claim for the refund of the federal transportation tax of \$15,168.20, which claim has not been rejected by the Commissioner of Internal Revenue.

11. By reason of the premises there has been erroneously and illegally exacted and collected from the Plaintiff the sum of \$15,168.20, as aforesaid for the reason set forth hereinabove and in the claim for refund, Exhibit C, is incorporated herein by reference and although payment of the said sum to the Plaintiff has been duly demanded by Plaintiff, no part thereof has been refunded, paid or credited to the Plaintiff and Defendant has retained and still retains said sum and has refused and still refuses to pay said sum or any part thereof.

12. Defendant owes Plaintiff the sum of \$15,168.20, together with interest thereon from the respective dates on which it was paid to the Collector of Internal Revenue for the District of Oregon at Portland, Oregon.

Wherefore, Plaintiff demands judgment against Defendant for the sum of \$15,168.20, together with

interest thereon from the respective dates on which it was paid and the costs and disbursements of this action.

/s/ MEREDITH M. DAUBIN,
ZUNDEL, DANZ, BRAIN &
ISAAC.

Duly verified.

EXHIBIT A

Contract No. W35-026-eng-5686

Supply Contract
Department of the Army

Contractor and Address:

J. G. SHOTWELL,
215 South Third,
Albuquerque, New Mexico.

Contract for:

Furnishing Concrete Aggregate for McNary
Dam.

Amount:

\$1,498,200.00 (Estimated).

Location:

McNary Dam, Oregon and Washington.

Payment:

To be made by the Disbursing Officer, Corps of
Engineers, at 628 Pittock Block, Portland 5,
Oregon.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotments, the available balances of which are sufficient to cover the cost of the same:

Appropriation:

21x3000 Columbia River, Oregon and Washington, Umatilla (McNary Dam).

W.D. Form No. 1 (Civil)

1 Nov., 1946

Portland District Letterhead

NPPSP

August 26, 1948.

Registered

J. G. Shotwell,
St. John,
Washington.

Dear Sir:

There is inclosed for your file contractor's number of Contract No. W35-026-eng-5686, for furnishing concrete aggregate for McNary Dam.

Your attention is invited to paragraph SC-1 of the specifications which stipulates that "The Contractor will be required to commence the establishment of the necessary plant for production of aggregate under this contract within 10 calendar days after the date of receipt by him of notice to

proceed, to prosecute said work with faithfulness and energy, and to deliver materials in the sizes and quantities as provided for in paragraph SC-4." You are hereby notified to proceed with the work.

This notice is sent to you in triplicate. Please insert the date of receipt and sign in the space provided below on the original and one copy hereof and return them to this office retaining one copy for your file.

Very truly yours,

/s/ O. E. WALSH,

Colonel, Corps of Engineers,
District Engineer.

1 Incl.: Contract.

The contract and above notice to proceed were received by the undersigned August 30th, 1948.

J. G. SHOTWELL,

By /s/ J. G. SHOTWELL.

Contract for Supplies

This Contract, entered into this 29th day of July, 1948, by the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and J. G. Shotwell, an individual trading as J. G. Shotwell, of the City of Albuquerque, in the State of New Mexico,

hereinafter called the Contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Scope of this Contract—The Contractor shall furnish and deliver for the consideration stated therein the supplies, services, materials and/or equipment set forth in Schedule "A" attached hereto, in strict accordance with the specifications and schedules, which are designated and set forth in said Schedule "A" and all of which are made a part hereof: Schedule "A," Engineer Form No. 719.

Specifications No. Eng-35-026-48-839, dated Portland District, Corps of Engineers, Department of the Army, 628 Pittock Block, Portland 5, Oregon, May 7, 1948.

* * *

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written:

THE UNITED STATES OF
AMERICA,

By /s/ O. E. WALSH,
Colonel, Corps of Engineers,
Contracting Officer.

J. G. SHOTWELL,
(Contractor)

By /s/ J. G. SHOTWELL,
Business Address: 215 South Third, Albuquerque,
New Mexico.

Two Witnesses:

/s/ PAUL R. BAUM,
Murfreesboro, Ark.

.....,
(Address.)

SCHEDULE A

Corps of Engineers

Consisting of 1 page, attached to and made a part of Contract No. W35-026-eng-5686.

Date July 29, 1948.

Invoices: Address and mail in quadruplicate to the District Engineer, Corps of Engineers, Department of the Army, 19 East Poplar Street, Walla Walla, Washington, who will inspect, voucher, and issue bills of lading, if required hereunder.

District Engineer,
19 East Poplar Street,
Walla Walla, Washington.

J. G. Shotwell,
Contractor,
215 South Third,
Albuquerque, New Mexico.

This Schedule A is attached to and made a part of the above-numbered contract. In accordance with the terms and conditions thereof the contractor will furnish the following:

By authority of the Civilian Production Administration the preference rating indicated is assigned to the deliveries on this contract.

Preference Rating:

Schedule A

Item No.	Supplies or Services	Quantity	Unit	Unit Price	Total Price
1a	Coarse aggregate deposited into designated storage piles	940,000	Ton	\$1,135	\$1,066,900.00
2a	Fine aggregate deposited into designated storage piles	380,000	Ton	1,135	431,300.00
Total Schedule A					\$1,498,200.00

Engineer Form No. 719.

EXHIBIT B

Corps of Engineers, U. S. Army
Office of the District Engineer

Walla Walla District
19 E. Poplar Street,
Walla Walla, Washington

June 28, 1950.

Mr. J. G. Shotwell,
Aggregate Contractor,
Umatilla,
Oregon.

Dear Sir:

The following statement, which is in connection with the hauling of concrete aggregate from your

aggregate plants at Berrian Island to the aggregate stockpile by your subcontractor, Keith Williams Company, is furnished you in compliance with your verbal request of June 27, 1950, to the Resident Engineer at McNary Dam:

Your aggregate plants at Berrian Island were located on Government property for the purpose of processing gravel from the Government-owned gravel deposits, and the haul road was on a right-of-way which was furnished by the Government. Your aggregate plants and truck hauling over the Government right-of-way were considered by this office to be within the work area of the McNary Dam project. The aggregate produced at the two Berrian Island plants and hauled by the Keith Williams Company was incorporated into the McNary Dam concrete structures.

Very truly yours,

/s/ WM. WHIPPLE,

Colonel, Corps of Engineers,
District Engineer.

(Copy)

[Endorsed]: Filed November 18, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant by the United States Attorney for the Western District of Washington and in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Paragraph 1 is admitted.

II.

Paragraph 2 is admitted.

III.

Paragraph 3 is denied except that it is admitted that Exhibit A attached to the complaint is a copy of a contract between the Department of the Army and the plaintiff.

IV.

Paragraph 4 is admitted.

V.

Subparagraph 1 of paragraph 5 is denied. Subparagraph 2 of paragraph 5 is denied except that it is admitted that the plaintiff paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the amount of \$505,606.54 under a contract for the movement of aggregates from Government-owned property on Berrian Island over Government-owned roads to the McNary Dam site.

VI.

Paragraph 6 is admitted.

VII.

Paragraph 7 is denied.

VIII.

Paragraph 8 is denied.

IX.

Subparagraph of paragraph 9 is admitted except that it is denied that there was any overpayment of taxes on the transportation of property or that any taxes were illegally assessed or collected from the plaintiff. Subparagraph 2 of paragraph 9 is admitted except that the truth of the contents of the claim for refund is denied.

X.

Paragraph 10 is denied. On the contrary it is alleged that the claim for refund was rejected in full by letter dated August 4, 1954.

XI.

Paragraph 11 is denied.

XII.

Paragraph 12 is denied.

Wherefore, having answered, the defendant prays that the plaintiff's complaint be dismissed and the defendant awarded its allowable costs.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ EDWARD J. McCORMICK, JR.,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
BY PLAINTIFF

Comes now, J. G. Shotwell, plaintiff, by his counsel of record, Meredith M. Daubin, and moves this Court for Summary Judgment on the Complaint and Answer and the Affidavit of J. G. Shotwell submitted herewith, and for cause shows that:

1. The above-entitled cause is at issue.
2. The answer of the defendant does not present a disputed question of a material fact.
3. The transactions existing in the present case do not constitute transportation of property from one point in the United States to another point within the meaning of Section 3475 (now Section 4272) of the Internal Revenue Code.

Wherefore, it is moved that this Court award the plaintiff Judgment against the defendant in the amount of \$15,168.20 together with interest thereon from the respective dates on which it was paid together with costs and disbursements of this action.

/s/ MEREDITH M. DAUBIN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF J. G. SHOTWELL IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

J. G. Shotwell, first being duly sworn upon his oath, deposes and says as follows:

1. J. G. Shotwell (plaintiff) is a citizen of the United States of America; his present address is 5908 Southeast 20th Street, Mercer Island, Washington; former address, Umatilla, Oregon.

2. This action arises to recover taxes assessed and collected under Section 3475 of the Internal Revenue Code on the transportation of property; said taxes were collected from J. G. Shotwell (plaintiff) by Hugh H. Earle as the United States Collector of Internal Revenue for the District of Oregon, Portland Oregon; said Earle is not now the Collector of Internal Revenue for the District of Oregon and he is now out of the said office.

3. July 29, 1948, the Department of the Army, the United States of America, contracted with J. G. Shotwell (plaintiff) to move large quantities of coarse and fine aggregates to the McNary Dam, Umatilla, Oregon, to be used by the Government and to be incorporated in the Government-owned McNary Dam. The coarse and fine aggregates were a part of Berrian Island, Washington, which is a Government owned property five miles upstream from the McNary Dam site. A photostat copy of the

contract is attached as Exhibit "A" to the complaint and is incorporated herein by reference.

4. The haul road from Berrian Island, Washington to the McNary Dam site was on Government-owned property and the Corps of Engineers, United States Army, in charge of the construction of the McNary Dam, determined Berrian Island and the haul road to be within the work area of the McNary Dam project. The aggregates moved from Berrian Island and deposited at the McNary Dam site were incorporated into the McNary Dam concrete structure.

A copy of a letter from the District Engineer, Corps of Engineers, United States Army, dated June 28, 1950, is attached as Exhibit "B" to the complaint and is as follows:

Corps of Engineers, U. S. Army
Office of the District Engineer

Walla Walla District
19 E. Poplar Street
Walla Walla, Washington

June 28, 1950.

Mr. J. G. Shotwell,
Aggregate Contractor,
Umatilla, Oregon.

Dear Sir:

The following statement, which is in connection with the hauling of concrete aggregate from your aggregate plants at Berrian Island to the aggregate

stockpile by your subcontractor, Keith Williams Company, is furnished you in compliance with your verbal request of June 27, 1950, to the Resident Engineer at McNary Dam:

Your aggregate plants at Berrian Island were located on Government property for the purpose of processing gravel from the Government-owned gravel deposits, and the haul road was on a right-of-way which was furnished by the Government. Your aggregate plants and truck hauling over the Government right-of-way were considered by this office to be within the work area of the McNary Dam project. The aggregate produced at the two Berrian Island plants and hauled by the Keith Williams Company, was incorporated into the McNary Dam concrete structures.

Very truly yours,

/s/ WM. WHIPPLE,

Colonel, Corps of Engineers,
District Engineer.

5. Attached hereto as Exhibit "D" is a copy of the subcontract between J. G. Shotwell (plaintiff) and Keith Williams concerning the movement of the aggregates from Berrian Island to the McNary Dam site.

6. J. G. Shotwell (plaintiff) paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the sum of \$505,605.54 under the subcontract for the movement of the aggregates from Govern-

ment-owned Berrian Island over Government-owned roads to the McNary Dam site.

7. The aggregates were incorporated in the McNary Dam structure, which is Government-owned.

8. Attached hereto as Exhibit "E" is a pictorial folder of "McNary Dam" constructed under supervision, Corps of Engineers, U. S. Army, Walla Walla District, showing the McNary Reservoir created by the McNary Dam.

Between the areas designed in the folder "Hat Rock State Park" and "Berrian" lies, now submerged Berrian Island from which the aggregates were moved to the McNary Dam site to be incorporated in the McNary Dam structure.

9. The Collector of Internal Revenue, Portland, Oregon, Hugh H. Earle, assessed to J. G. Shotwell (plaintiff) and J. G. Shotwell (plaintiff) has paid to the said Collector of Internal Revenue during November and December, 1951, the sum of \$15,168.20 as Federal Transportation Tax under Section 3475 of the Internal Revenue Code at the rate of 3% on the above payment of \$505,606.54.

10. April 28, 1952, J. G. Shotwell (plaintiff) filed with the Collector of Internal Revenue, District of Oregon, Portland, Oregon, a claim for refund of this \$15,168.20 asserting that it was an overpayment of tax on transportation of property and that it was illegally assessed and collected in November and December, 1951.

A copy of the claim is attached as Exhibit "C" to the complaint and is incorporated herein by reference.

11. A period of more than six months has elapsed since the filing of the said claim for the refund of the amount assessed and paid as federal transportation tax of \$15,168.20 and the claim was rejected by the Commissioner of Internal Revenue on or about August 4, 1954.

12. The Commissioner of Internal Revenue, under dates of June 12, 1951, and September 6, 1951, addressed letters to Meredith M. Daubin relative to the tax liability of J. G. Shotwell (plaintiff) for transportation tax on the payments made to Keith Williams as described above. The letters are attached as Exhibits "F" and "G."

13. The defendant, United States of America has not repaid, refunded or credited to J. G. Shotwell (plaintiff) the said sum of \$15,168.20 but has retained the said sum and refuses to repay the same to J. G. Shotwell.

14. The defendant, United States of America has illegally exacted and collected from J. G. Shotwell (plaintiff) the sum of \$15,168.20 and there is owing to J. G. Shotwell the said sum of \$15,168.20 together with interest thereon from the respective dates on which it was paid to the Collector of Internal Revenue for the District of Oregon, Portland, Oregon.

/s/ J. G. SHOTWELL.

County of King,
State of Washington—ss.

Subscribed and sworn to before me this 5th day
of July, 1955.

[Seal] /s/ ELROY F. WIENL,
Notary Public.

Copies received July 19, 1955.

UNITED STATES ATTORNEY,
Seattle, Washington.

By /s/ A. M. PETERS.

Shotwell vs. U. S.

No. 3826

Exhibit "A"

United States Corps of Engineers, Contract No.
W35-026-eng-5686 dated July 29, 1949.

Attached to complaint.

Exhibit "B"

United States Corps of Engineers, Letter signed
Col. Wm. Whipple, dated June 28, 1950.

Attached to complaint.

Exhibit "C"

Claim for Refund of \$15,168.20 filed April 28,
1952.

Attached to complaint.

EXHIBIT D

This Contract, entered into this . . . day of October, 1948, by and between J. G. Shotwell, of Albuquerque, New Mexico, hereinafter called the General Contractor, and Keith Williams, of Vicksburg, Mississippi, hereinafter called the Subcontractor, Witnesseth:

Whereas, the General Contractor has entered into a contract with the United States of America, under date of July 29, 1948, for the furnishing of concrete aggregate for McNary Dam, located on the Columbia River, Oregon and Washington, being Contract No. W35-026-eng-5686 of the United States Corps of Engineers, War Department, hereinafter referred to as the General Contract; and

Whereas, there is included in said contract certain items of work wherein hauling of approximately 1,320,000 tons of aggregate from source of supply or deposits thereof on Berrian Island, in the Columbia River, to the General Contractor's processing plant to be located at site designated for storage piles for said aggregate at the Government's reclaiming tunnel at the site of said dam as provided in said General Contract, is required to comply with the schedule of United States Corps of Engineers Specifications, Serial No. Eng. 35-026-48-839, which are attached to and made a part of said General Contract; and

Whereas, the parties hereto mutually desire that said items of work consisting of said hauling shall

be subcontracted by the General Contractor to the Subcontractor;

Now, Therefore, in consideration of the premises and the covenants and conditions herein contained, it is agreed between the parties hereto as follows:

1. That in consideration of the prices hereinafter stated the Subcontractor shall furnish all of the equipment and materials and supplies, and shall perform all the work necessary or required to fully complete the above items of work of hauling in strict accordance with the General Contract and said Specifications, Serial No. Eng. 35-026-48-839, all of which are made a part of this agreement. The Subcontractor agrees that he has read the General Contract and Specifications and drawings, and that he fully understands the same, and that he agrees to be governed by each and all of the provisions and requirements of same on all his operations and to fully perform and comply therewith to all intents and purposes as though the same were herein set out in full, and the Subcontractor does hereby assume toward the General Contractor all of the obligations and responsibilities that the General Contractor by said documents assumes toward the United States of America.

2. Work shall be commenced by the Subcontractor at the time rendered necessary and required by the terms of said General Contract, and carried on at a rate of progress so as to keep at least 6,000 tons of aggregate in the storage pile at the General Contractor's processing plant, provided that the General

Contractor does not produce more aggregate than the Government is required to pay for for the current month pursuant to the terms of said General Contract, and the Subcontractor shall fully complete such work on or before the date rendered necessary or required therefor by said General Contract. It is understood and agreed that the Subcontractor shall furnish sufficient, satisfactory and adequate equipment and experienced workmen to make the progress and do the work in accordance with the schedule herein and by said General Contract required. The Subcontractor shall employ workmen who will at all times work in harmony with the General Contractor's men.

3. The General Contractor shall build an adequate road from the entrance to the gravel bar on said Berrian Island to the General Contractor's plant at the Government's reclaiming tunnel aforesaid, and shall maintain the same in such condition as to provide reasonable hauling conditions for the Subcontractor at all times. The Subcontractor shall assist in the construction of said road through the hauling of gravel and other materials therefore. The General Contractor shall also build a necessary road or roads on Berrian Island. Said roads on Berrian Island shall be maintained by the Subcontractor, but the General Contractor shall furnish a water truck for use in connection with such maintenance, which truck shall be operated by the Subcontractor.

4. The amount to be paid the Subcontractor by the General Contractor for work completed and ac-

cepted is the sum of 40c per ton for the hauling of said aggregate. The tonnage to be paid by the General Contractor to the Subcontractor shall be the same as the amount thereof delivered to and paid for by the Government pursuant to the General Contract; provided, that should the waste in processing said aggregate exceed 5%, then the aggregate hauled by the Subcontractor in excess of such 5% shall be paid for by the General Contractor at such rate of 40c per ton; and provided further, that the Subcontractor shall be paid at said rate per ton for any excess processed material which he may have hauled and which may remain on hand upon completion of the contract and not be accepted by the Government. The parties shall conduct substantially uniform operation in conformity with the requirements of said General Contract. Said aggregate shall be loaded on the Subcontractor's trucks by the General Contractor so as to permit the maintaining of the schedule of deliveries required of the Subcontractor.

5. Payments shall be made to the Subcontractor by the General Contractor in the same manner and in the same percentages and at the same time as payments are made by the Government to the General Contractor in accordance with the terms of the General Contract.

6. The Subcontractor shall take out and carry insurance as required for the General Contractor in the General Contract and shall furnish surety bonds acceptable to the General Contractor in amounts which bear the same proportion to the total amount

of bonds required of the General Contractor by the General Contract as the approximate amount to be paid the Subcontractor hereunder bears to the approximate amount to be paid the General Contractor under the General Contract, to guarantee the faithful performance of this contract and to guarantee payment to persons furnishing labor and material and services used in connection with the performance of this contract.

7. The Subcontractor shall keep accurate records and make all reports required by law with reference to social security taxes, old age benefits, and any other taxes that may be levied or assessed by the United States Government or the State of Washington, and shall pay any and all taxes, levies or assessments under any of such laws before final settlement is made hereunder; provided, that should it be determined that the payments to be made by the General Contractor to the Subcontractor hereunder are subject to Federal transportation tax, then the amount of such tax shall be borne one-half by each of the parties hereto.

8. It is the understanding of both parties hereto that the hauling to be performed hereunder is confined to property and will be over roads wholly owned or controlled by the United States Government, and that the Subcontractor's operations hereunder are not and will not be subject to the jurisdiction of the Department of Transportation of the State of Washington, and should it be determined that this contract is subject to such jurisdiction, the Subcontractor shall obtain any and all necessary

permits to authorize such operation, and of the rate of charge to be paid for all of the hauling of aggregate as fixed hereby, and in case of the Subcontractor's failure or inability so to do, this contract shall be subject to immediate termination by notice in writing by the General Contractor to the Subcontractor.

9. The Subcontractor shall not assign this contract nor any right thereunder, nor any part thereof, without the prior written consent of the General Contractor.

10. The Subcontractor shall have no claim against the General Contractor for costs or damages arising from causes beyond the reasonable control of the General Contractor and without fault or neglect on his part, unless the General Contractor is able to obtain reimbursement from the United States Government for such costs or damages.

11. Any notice or notices which either party is to give the other hereunder shall be given by delivering the same to the other in person or by depositing the same in the United States Mail, postpaid, addressed to the General Contractor as follows:

J. G. SHOTWELL,
215 So. 3rd Street,
Albuquerque, N. M.

and the Subcontractor as follows:

KEITH WILLIAMS,
P. O. Box 45,
Vicksburg, Mississippi.

In Witness Whereof, the parties have hereunto
set their hands the day and year first above written.

.....,

General Contractor.

Witness as to General Contractor:

.....,

.....

Subcontractor.

Witness as to Subcontractor:

.....

EXHIBIT F

U. S. Treasury Department

Washington 25

June 12, 1951.

Office of Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to ExT:M:RHH

Mr. Meredith M. Daubin,

Dow, Lohnes and Albertson,

Munsey Building,

Washington 4, D. C.

Dear Mr. Daubin:

Reference is made to your letter dated April 4,
1951, submitted in response to a letter addressed to
you under date of March 16, 1951, relative to the

liability of Mr. J. G. Shotwell, Umatilla, Oregon, for payment of tax on the transportation of property in the amount of \$17,634.23 imposed by section 3475 of the Internal Revenue Code. The tax is applicable to amounts which Mr. Shotwell paid to two trucking concerns for hauling services furnished by them during the period October 1, 1948, to June 8, 1950.

In the letter of March 16, 1951, you were advised of the Bureau's determination that the tax in question is due and properly collectible from Mr. Shotwell. You state that the statements made in the letter appear irreconcilable with the facts as presented and for a better understanding of the conclusion expressed in such letter, you request that you be advised with respect to certain queries, which are set forth in the following, together with the answers thereto.

"1. Is it not a fact that the aggregate or gravel deposits at Berrian Island were owned by the United States Government and that the United States Government desired approximately 1,320,000 tons of this aggregate or gravel delivered and deposited in its stock pile at dam-site of McNary Dam?"

It is correct that the aggregate or gravel deposits on Berrian Island were owned by the United States Government. However, with regard to your statement that "the United States Government desired approximately 1,320,000 tons of this aggregate or gravel delivered and deposited in its stockpile at damsite of McNary Dam" your attention is directed

to paragraph SC-19 of the contract which provides, in part, as follows:

“SC-19, Concrete Aggregates—a. Source—
The Contractor shall procure the concrete aggregates from deposits on Berrian Island, which is owned by the Government and is available to the Contractor as a source of supply. There is available within the designated area and within the approved limits shown on the drawings, an adequate supply of material from which concrete aggregates can be processed. The right is reserved, however, to reject certain localized areas, strata, or channels within the approved area and zone when in the opinion of the Contracting Officer, the material is unsatisfactory for use in the structures under consideration. The Contracting Officer has completed preliminary investigations of the aggregate deposits on Berrian Island to determine whether this source can supply aggregates conforming to all of the requirements of Part IV of these specifications. Bids for this work will be evaluated on the premise that the Contractor will furnish all of the aggregate for the concrete from the deposits on Berrian Island, and that the aggregate will meet all the provisions of these specifications. In the event that results of the final tests on the aggregate from deposits on Berrian Island prove to be unsatisfactory, the Contracting Officer reserves the right to require the Contractor to procure satisfactory aggregate from other sources, in which case a change

order will be issued and an equitable adjustment in the consideration of the contract will be made.”

“2. Is it not a fact that this aggregate or gravel was moved by truck from Berrian Island to the stockpile at the damsite over roads entirely upon the property of the United States Government under the Keith Williams subcontract?”

The file in the case contains a copy of a letter dated June 28, 1950, addressed to Mr. J. G. Shotwell, and signed by Wm. Whipple, Colonel, Corps of Engineers, District Engineer, in which it is stated that Mr. Shotwell's aggregate plants at Berrian Island were located on Government property for the purpose of processing gravel from the Government-owned gravel deposits, and the haul road was on a right-of-way which was furnished by the Government. It is also stated that the aggregate produced at the two Berrian Island plants and hauled by the Keith Williams Company, was incorporated into the McNary Dam concrete structures.

“3. Is it understood that the contract with the United States Corps of Engineers, Contract No. W35-026-eng-5686, dated July 29, 1949, in which J. G. Shotwell is the General Contractor, provides for:

“1a. Coarse aggregate deposited into designated storage piles.

940,000—Ton \$1.135\$1,066,990.00

“2a. Fine aggregate deposited into designated storage piles.”

380,000—Ton \$1.135 431,300.00

Total Schedule A.....\$1,498,200.00

The foregoing appears to be a correct copy of the items set forth in Schedule A, attached to, and made a part of the contract in question.

“4. Is it not a fact that the same contract by Article 5, covers damages for ‘Delays in Delivery’?”

Article 5, “Delays—Liquidated Damages,” of the contract provides for certain liabilities against the contractor in case he refuses or fails to make delivery of the materials or supplies within the time specified in Article 1, or any extension thereof.

“5. Is it not a fact that the Commissioner of Internal Revenue has, by unpublished ruling or rulings, held that a statement in contract to the effect that “all applicable excise taxes” are included in the contract price does not include the Federal Transportation Tax on Property as Provided by Section 3475 of the Internal Revenue Code?”

“In other words, in order for the Federal Transportation Tax on Property, as provided by Section 3475 of the Internal Revenue Code, to be included in the contract price, the contract must specifically so state?”

In cases where the question is raised as to whether a payment to a carrier includes transportation tax.

the Bureau is of the opinion that unless it is expressly agreed between the person paying the transportation charges and the carrier that the amount paid to the carrier includes both the transportation charges and the tax applicable thereto, such person is liable for payment of the tax computed on the basis of 3 per cent of the total amount paid to the carrier.

“6. Is it not a fact that by Section 3475 of the Internal Revenue Code, the owner of the property which is the subject of the contract for hauling is, in fact, ultimately liable for the Federal Transportation Tax unless it is included in the contract price?”

The tax imposed by Section 3475 of the Code is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. Ownership of the property transported is immaterial.

In your letter you request a conference on the case at a time convenient.

As set forth in Bureau letter dated March 16, 1951, if a conference is desired your request therefore should include a statement of the day and hour on which you wish to appear for the hearing. Unless notified to the contrary, you may then assume that the date and hour so stated are satisfactory to this office. You should call at Room 6237, Internal Revenue Building, Twelfth Street and Constitution Avenue, N. W., Washington, D. C.

If no request for a hearing is received within fifteen days from the date of this letter, assessment of tax in the amount of \$17,634.23 will be entered against Mr. Shotwell and, upon receipt of notice of tax due from the Collector of Internal Revenue, Portland, Oregon, remittance should be forwarded to his office.

Very truly yours,

/s/ CHARLES J. VALAER,
Deputy Commissioner.

EXHIBIT G

U. S. Treasury Department
Washington 25

Sept. 6, 1951.

Address Reply to
Commissioner of Internal Revenue
and Refer to ExT:M:RHH

Mr. Meredith M. Daubin,
Dow, Lohnes and Albertson,
Munsey Building,
Washington 4, D. C.

Dear Mr. Daubin:

Reference is made to your letter dated June 14, 1951, relative to the liability of Mr. J. G. Shotwell, Umatilla, Oregon, for payment of tax on the trans-

portation of property in the amount of \$17,634.23 imposed by Section 3475 of the Internal Revenue Code. The tax is applicable to amounts which Mr. Shotwell paid to two trucking concerns for hauling services furnished by them during the period October 1, 1948, to June 8, 1950.

In your letter you set forth your conclusions as to the facts of the case and you state that it appears that if any tax liability exists then the United States Government itself is liable since the Government actually paid for the movement of its property. You request to be advised whether this office will proceed against the Government for the tax.

In accordance with the provisions of section 3475 (a) of the Internal Revenue Code the tax on the transportation of property applies only to amounts paid to a person engaged in the business of transporting property for hire.

As you were previously advised in Bureau letter of March 16, 1951, it is the opinion of the Bureau that Mr. Shotwell's contract with the United States Corps of Engineers, Department of the Army, was essentially for the production of aggregates and that Mr. Shotwell was not a "person engaged in the business of transporting property for hire" within the meaning of section 3475(a) of the Code. Therefore, the tax on the transportation of property did not apply to any part of the payments made by the United States Corps of Engineers to Mr. Shotwell for the services furnished by him in the perform-

ance of the contract. However, since the trucking concerns which performed the hauling involved are persons engaged in the business of transporting property for hire and since Mr. Shotwell paid to such concerns the charges for the hauling services, Mr. Shotwell is the person who made the taxable transportation payments and is the person properly liable for payment of the tax, irrespective of the ownership of the property transported. Furthermore, the question whether Mr. Shotwell, under the terms of his contract with the United States Corps of Engineers, is entitled to be reimbursed by the United States Corps of Engineers for any tax he is required to pay is a matter of settlement between those parties and is not a matter within the jurisdiction of this Bureau.

In your letter you also refer to the decision of the United States Court of Appeals, Third Circuit, dated March 13, 1951, in the case of *Edward H. Ellis & Sons, Inc., v. United States*, and you request to be advised whether by the rule of that case the services under the J. B. Shotwell contract are in fact taxable transportation.

The Bureau will follow the decision of the court in the Ellis case in any other case where the facts are identical, i.e. movement of earth in the leveling or grading of an airfield, plant site, or similar project when such movement is restricted within the confines of the project. However, the facts in the Ellis case may be distinguished from the facts in the

instant case and, accordingly, the decision in the Ellis case is not controlling.

In your letter dated June 14, 1951, you indicated a desire for a conference on this case. You state that the selection of a definite date for a conference will be postponed pending receipt of a reply to your letter.

If a conference is still desired, your request therefor should include a statement of the day and hour on which you wish to appear for the hearing. Unless notified to the contrary, you may then assume that the date and hour so stated are satisfactory to this office. You should call at Room 6237 of the Internal Revenue Building, 12th Street and Constitution Avenue, N. W., Washington, D. C.

If no request for a hearing is received within fifteen days from the date of this letter, assessment of tax in the amount of \$17,634.23 will be entered against Mr. Shotwell and, upon receipt of notice of tax due from the Collector of Internal Revenue, Portland, Oregon, remittance should be forwarded to his office.

Very truly yours,

/s/ CHARLES J. VALAER,
Deputy Commissioner.

Receipt of copy acknowledged.

[Endorsed]: Filed July 19, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
BY DEFENDANT

Defendant moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the defendant's favor dismissing the complaint.

The ground for this motion is that there is no genuine issue as to any material fact underlying the complaint and that the defendant, under the decision of the Court of Appeals for the Ninth Circuit in *Getchell Mines, Inc. v. United States*, 181 F. 2d 987, is entitled to a judgment as to this claim as a matter of law.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel, Internal
Revenue Service.

Receipt of copy acknowledged.

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

JOINT STIPULATION

Comes now the parties to the above cause by their Counsel, and agree and stipulate as follows:

That the deposition of Bertram W. Hoare, as taken at Walla Walla, Washington, October 27, 1955, including Joint Exhibits 1, 2 and 3, heretofore deposited with the Clerk of The Court, may be filed herein as agreed facts in this cause.

/s/ MEREDITH M. DAUBIN,
Counsel for Plaintiff;

/s/ ARTHUR BIGGINS,
Attorney, Justice Dept.

Washington, D. C., April, 1956.

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Cause.]

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiff J. G. Shotwell seeks to recover taxes collected under Section 3475, Internal Revenue Code, in the amount of \$15,168.20 together with interest from time of payment.

The Court is presently concerned with motions for summary judgment by both plaintiff and defendant.

By stipulation filed August 13, 1956, the parties have agreed that the deposition of Bertram W. Hoare, the Assistant Chief of Construction Division, Corps of Engineers, United States Army, taken October 27, 1955, including Joint Exhibits 1, 2 and 3, deposited with the Clerk of the Court, may be filed herein as agreed facts in this cause.

A summary of the material facts alleged in plaintiff's complaint and admitted by defendant's answer is the following:

Taxes under Section 3475 of the Internal Revenue Code were collected by Hugh H. Earle as the Collector of Internal Revenue for the District of Oregon who was not in office as Collector at the time this action was commenced;

The Court has jurisdiction over this action under Section 1346(a)(1), Title 28 U.S.C.A.;

Exhibit "A," attached to the complaint, is a copy of a contract between the Department of the Army and the plaintiff;

The haul road from Berrian Island, Washington, to the McNary Dam site was on Government-owned property and the Corps of Engineers, United States Army, in charge of the construction of the McNary Dam determined Berrian Island and the haul road to be within the work area of the McNary Dam project. The aggregates moved from Berrian Island and deposited at the McNary Dam site were incorporated into the McNary Dam concrete structure;

Plaintiff paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the amount of \$505,606.54 under a contract for the movement of aggregates from Government-owned property on Berrian Island over Government-owned roads to the McNary Dam site;

The Collector of Internal Revenue assessed to the plaintiff and the plaintiff has paid to the said Collector of Internal Revenue during November and December, 1951, the sum of \$15,168.20 as federal transportation tax under Section 3475 of the Internal Revenue Code at three (3) per cent on the amount of \$505,606.54;

On April 28, 1952, the plaintiff filed with the Collector of Internal Revenue, District of Oregon, Portland, Oregon, a claim for a refund of \$15,168.20 assessed and collected in November and December, 1951. A copy of said claim is attached to the complaint as Exhibit "C."

Portions of the deposition of Bertram W. Hoare, which the Court deems of interest here, are as follows:

"Q. Would you briefly state the sequence of events which occurred as a result of the construction of the dam axis—the dam at the dam axis?

"A. I presume you mean the general schedule of operations for the complete project? The initial operation was to acquire real estate at the immediate dam site. Following that, construction was instituted of some living facilities for construction

workers in McNary City, and also in the temporary housing area known as Homaja, which was approximately two miles upstream from the dam on the Washington shore. McNary City was located on the Oregon shore, the nearest point to the dam itself being approximately one-half mile and the furthest point a mile and a half from the Oregon abutment. The next operation was the construction of certain access facilities to the dam site, followed by a contract for the excavation of the area in which the navigation lock was to be constructed. This lock was built on the Washington end of the dam. At about the completion of the excavation contract, a contract was entered into with Mr. J. G. Shotwell for obtaining the processing and the stockpiling of aggregates for concrete which was to be used in the construction of the lock and of the Washington end of the dam. * * *

“Q. What was the reason for the separate aggregate contract in reference to the first major construction?

“A. I presume you mean Mr. Shotwell’s contract?

“Q. Yes.

“A. That contract was made separately so that work could be instituted procuring the aggregates and actually having it stockpiled so as to expedite the construction of the navigation lock. It was a matter of planning to supply the aggregate to the construction contractor to shorten the time required by him between his notice to proceed and the date at which he could be placing concrete. It was also

intended should there be other auxiliary work undertaken that the Government could also furnish aggregate to other contractors in small amounts.

“ * * *

“A. The aggregate processing plants on Berrian Island were located—and referring to Joint Exhibit 3, in Lot 1 of Section 8, Township 5 North, Range 29 East, and upstream in Lot 4 of the same section. The road used to haul the material to the dam site is shown on Exhibit 3 and is marked with the word ‘road.’ It is that road which lies immediately to the north of the S. P. & S. Railroad before relocation. The continuation of this road is shown by a dashed symbol on Exhibit 2 on the north side of the S. P. & S. Railroad right of way. The haul road continued downstream to a point approximately a quarter of a mile below the dam axis, at which point was located a re-claiming tunnel over which the aggregates were dumped. This applied to all aggregate, excepting the sand which was further processed in the vicinity of the re-claiming tunnel. Mr. Shotwell’s responsibility and execution of his contract ended with the delivery of the materials in stockpiles at this point. * * *”

“Q. Is it a fact that the Government wanted the gravel it owned on Berrian Island in the McNary project moved to the McNary dam site so that the gravel could be incorporated in the McNary Dam? A. It is, * * *.

“Q. The gravel removed by Shotwell on Berrian Island was hauled over Government right of ways to the dam structure and used therein?

“A. That is correct.

“Q. Then it is not a fact that the gravel on Berrian Island and the haul roads were all a part of the work area of the dam construction?

“A. * * * I would consider that Berrian Island was within the project area, although it would not appear to be what would normally be considered within the dam construction area.”

The Court is of the opinion that no genuine issue as to any material fact exists.

In his reply brief, filed August 13, 1956, plaintiff states his contention as follows:

“The plaintiff contends that this movement of gravel solely within the confines of the project and used as an integral part of the construction project is not taxable as ‘transportation’ of property from one point in the United States to another under Section 3475.”

In *Getchell Mine v. United States*, 181 F. 2nd 987, 990, the Court of Appeals for the Ninth Circuit discussed questions pertinent here:

“(4) Appellant argues that the word ‘point,’ means the same as ‘place,’ and that since the whole enterprise of appellant, the mining, milling and hauling, were conducted upon its own ground, which was a single ‘place,’ the transportation was not ‘from one point in the United States to another.’

“We think Section 3475(a) is not susceptible of such a construction, and that the hauling here was

from point to point within the meaning of the Act. The case of *Lyle v. United States*, D. C., 76 F. Supp. 787, upon which reliance is had, held no more than that the use of trucks in grading an airfield, where the trucks were used to haul earth from a power shovel to dumps and fills, was not a use for transportation under the Act. We regard it as not apposite here. * * *

Plaintiff relies heavily upon *Edward H. Ellis & Sons v. United States*, decided March 13, 1951, 3 Cir., 187 F. 2d 698.

The state of facts under which the tax was imposed in the *Ellis* case are set out in the opinion of Judge McLaughlin as follows:

“Appellee, a general contractor, agreed with the Texaco Company that it would clear, level and grade a tract of land owned by the Texaco Company in West Deptford Township, New Jersey, on which the Texaco Company proposed to construct a large oil refinery and storage plant.

“In connection with the clearing, leveling and grading of the tract, appellee entered into an oral subcontract with one Krantz whereby the latter was to furnish appellee with trucks and drivers to assist in that project. Krantz was to be paid at an hourly or daily rate per truck. His trucks were used exclusively within the boundaries of the tract. They moved earth from points in the area where it was being excavated to points in the same area where it was needed as fill. The trucks were loaded by grad-

ing shovels. They carried the earth distances varying from three hundred feet to one mile. Where the distance from an excavation to a place which was to be filled was less, appellee itself moved the earth by means of men with hand shovels, bulldozers, carry-alls or otherwise. Krantz, admittedly, is in the trucking business and within the statutory definition of “ * * * a person engaged in the business of transporting property for hire * * * .”

The Court of Appeals detailed its reasons for agreeing with the finding of the District Judge that the transactions in the Ellis case did not constitute transportation of property from one point in the United States to another within the meaning of Section 3475 of the Internal Revenue Code:

“(2) The other minor query is whether the earth carried by the Krantz trucks was ‘property’ as intended by the statute. We think it was and if the facts really pointed to its ‘transportation’ we would not have the slightest difficulty in upholding the tax. But it is on that vital issue of whether the moving of the earth, under the circumstances before us, constituted ‘transportation * * * from one point in the United States to another, * * *’ as contemplated by Section 3475 we differ from appellant. The operation by the Krantz trucks was an integral part of the construction of the oil company’s plant. It concerned the clearing, grading and leveling of the premises for that sole purpose. It did not concern transportation as that term is commonly employed.

We are entitled to consider that the use of the word in the Code was confined to its ordinary sense. * * *

“(3) This movement of earth, an important element in the initial steps of the erection of the Texaco plant, namely, the clearing, grading and leveling of the tract, fails to meet the everyday usage of the term transportation. It fails in evidencing any kinship to the various meanings of the word given in the Treasury Regulations supplementing Section 3475. It fails of any support at all in the reported cases under Section 3475.”

In *Lyle v. United States*, N.D.Ga., 76 F. Supp. 787, cited by plaintiff, the decision of the District Judge against the Commissioner of Internal Revenue was based upon facts similar to those found in *Ellis v. United States*, *supra*. The hauling in that case was in the construction of an airfield and involved moving earth incidental to grading and leveling of the airfield. The movement of earth in the *Ellis* and *Lyle* cases constituted an integral part of the construction there considered.

It will be noted that in his deposition Mr. Hoare testified “Mr. Shotwell’s responsibility and execution of his contract ended with the delivery of the materials in stockpiles” at a re-claiming tunnel. The movement of the aggregates from Berrian Island to the stockpiles by Williams amounted to a movement or transportation of material intended to be used in the construction of McNary Dam. The aggregates or gravel moved by Williams were not taken from excavations necessarily made in connection

with the clearing, leveling or grading of the actual dam site or taken from excavations made for the preparation of installations or foundations or other structures constituting the McNary Dam. It is obvious that the movement of the aggregates or gravel in the present case was not an integral part of the construction of McNary Dam.

Williams, in the carrying out of his contract, was a person engaged in the business of transporting for hire.

In *Bridge Auto Renting Corporation v. Pedrick*, 2 Cir., 174 F. 2d 733, the Court, in the course of its opinion, stated, on page 738:

“(2) * * * Without repeating in detail what the appellant did to earn the receipts which were taxed, it did in the aggregate all that was reasonably necessary to be done to transport its customer's property. Indeed, it is plain enough that these customers, regardless of what else they saw fit to do, had only to provide the goods for transport, direct the drivers where to take them and pay the appellant for performing the transportation service. It cannot be said that such service for pay did not make the appellant a person transporting property for hire to that extent even though in doing the greater part of its business it was otherwise engaged. While it may be that some of the M.C.C. decisions above cited rest in part on the fact that where a person is already engaged in the business of transporting property for hire, some special arrangement it makes for the use of part of its transportation facilities may be

the more readily recognized as but a variation in form without a change in substance from its regular business, whatever does in fact amount to transporting property for hire brings the person who does it within this taxing statute although no other part of his business does so or has done so."

Plaintiff's motion for summary judgment is denied.

Defendant, United States of America, is entitled to judgment as a matter of law and to recover costs herein incurred and is directed to prepare and submit a form of judgment.

Dated: This 23rd day of November, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed November 30, 1956.

In the United States District Court for the Western
District of Washington, Northern Division
Civil No. 3826

J. G. SHOTWELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Plaintiff having appeared in person by his attorney, Meredith M. Daubin, and the defendant having

appeared by Charles P. Moriarty, United States Attorney, and Arthur L. Biggins, attorney, Tax Division, Department of Justice, and a joint stipulation having been submitted by the parties and the Court having considered such stipulation

It Is Hereby Ordered and Adjudged that this action be dismissed on the merits and the defendant allowed his costs.

Dated at Seattle, Washington, this 28th day of March, 1957.

/s/ ROGER T. FOLEY,
United States District Judge.

Presented by:

/s/ THOMAS R. WINTER,
Of Counsel for U. S.

[Endorsed]: Filed and entered April 1, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: United States of America, defendant above named, and to Charles P. Moriarty, United States Attorney for the Western District of Washington.

Notice Is Hereby Given that J. G. Shotwell, the plaintiff above named, hereby appeals to the United

States Court of Appeals for the Ninth Circuit from that certain Judgment of Dismissal dated March 28, 1957, and signed by The Honorable Judge Roger T. Foley and entered and filed in the above-entitled cause on April 1, 1957.

MEREDITH M. DAUBIN,

By /s/ WILBUR ZUNDEL,

Attorneys for Appellant
J. G. Shotwell.

[Endorsed]: Filed April 26, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP and designation of counsel, I am transmitting herewith the following original documents and papers in the file dealing with the action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit, together

with a true copy of the docket entries, said papers and documents being identified as follows:

Docket entries,

1. Complaint, filed Nov. 18, 1954.
3. Answer of defendant, filed Jan. 20, 1955.
4. Plaintiff's Motion for Summary Judgment, filed July 19, 1955.
6. Affidavit of J. G. Shotwell in Support of Plaintiff's Motion for Summary Judgment, filed July 19, 1955.
8. Motion for Summary Judgment by Defendant, filed Aug. 11, 1955.
13. Joint Stipulation of Facts, filed Aug. 13, 1956.
10. Deposition of Bertram W. Hoare, filed Jan. 4, 1956, together with Joint Exhibits 1, 2 and 3.
14. Decision on Motions for Summary Judgment, filed Nov. 30, 1956.
15. Judgment, filed April 1, 1957.
17. Notice of Appeal, filed April 26, 1957.
18. Bond for Costs on Appeal, filed April 26, 1957.
19. Plaintiff's Designation of Record on Appeal, filed April 26, 1957.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of appellant for preparation of the record on appeal in this cause, to wit: Filing Notice of Appeal, \$5.00;

and that said amount has been paid to me by counsel for the appellant.

Witness my hand and official seal at Seattle this 23rd day of May, 1957.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15563. United States Court of Appeals for the Ninth Circuit. J. G. Shotwell, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 24, 1957.

Docketed: May 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Case No. 15563

J. G. SHOTWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS TO BE RELIED UPON
BY APPELLANT

1. The District Court erred in denying the Plaintiff's Motion for Summary Judgment.
2. The District Court erred in not granting Plaintiff's Motion for Summary Judgment.
3. The District Court erred in not denying Defendant's Motion for Summary Judgment.
4. The District Court erred in determining that the United States of America is entitled to Judgment as a matter of law.
5. The District Court erred in entering the Judgment in this cause against the Plaintiff, J. G. Shotwell and for the Defendant, United States of America.
6. The District Court erred in not entering a Judgment for Plaintiff and against Defendant, United States of America.

7. The District Court erred in not finding that the movement of gravel solely within the confines of the project and used as an integral part of the construction project is not taxable as 'transportation' of property from one point in the United States to another under Section 3475 of the Internal Revenue Code.

/s/ MEREDITH M. DAUBIN,
Attorney for Appellant.

[Endorsed]: Filed June 4, 1957.

No. 15577

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KURT KARL FRIEDRICH HEGERICH,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director, Immigration
and Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

BURTON C. JACOBSON,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

AUG 30 1957

PAUL P. CHASE, CLERK

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I.

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No. 15577

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KURT KARL FRIEDRICH HEGERICR,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director, Immigration
and Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction of the action for declaratory judgment to review the final administrative deportation order of the Immigration and Naturalization Service under the Administrative Procedures Act (5 U. S. C. 1009), and the Declaratory Judgment Act (28 U. S. C. 2201).

This Court has jurisdiction of this appeal from the findings, conclusions and judgment of the District Court [T. R. 22] in favor of the defendant and against the plaintiff, holding that said deportation order is valid, under the provisions of 28 U. S. C. 1291 and 1294(1), said order being a final decision of the District Court.

Statutes and Regulations Involved.

Section 241(a)(9) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(9)) reads as follows:

“§1251. Deportable aliens—General classes

“(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

“(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status;”

Section 101(a)(15) of the Immigration and Nationality Act (8 U. S. C. 1101 (a)(15)) reads as follows:

“§1101. Definitions

“(a) As used in this chapter—

“(15) The term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant aliens— . . .”

and then the section proceeds to list classes within which the appellant does not come, *e.g.* such as ambassadors, public ministers, officials, etc.

Section 244(e) of the Immigration and Nationality Act (8 U. S. C. 1254(e)) relates to voluntary departure and provides as follows:

“The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within

the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection. June 27, 1952, c. 477, Title II, ch. 5, §244, 66 Stat. 214.”

Section 242.21 of Title 8 of the Code of Federal Regulations relates to appeals and voluntary departure and provides as follows:

“§242.21 Appeals—(a) Non-appealable cases. An appeal shall not lie from a decision of a special inquiry officer denying an application for voluntary departure or preexamination as a matter of discretion where the special inquiry officer has found the alien statutorily eligible for voluntary departure or eligible for preexamination pursuant to Part 235a of this chapter, and the alien has been in the United States for a period of less than five years at the time of the service of the order to show cause in deportation proceedings. A Notice of Appeal shall not be filed or accepted in any case within the provisions of this paragraph.”

Statement of the Case.

This is an appeal from a decision of the District Court, affirming a final order of deportation by the Immigration and Naturalization Service, of appellant, admittedly an alien, after a judicial review of the administrative file which was offered in evidence as Appellee’s “Exhibit A”, which exhibit is transmitted to this Court in its original form and is not contained in the printed record on appeal.

Appellant is a 47-year-old male, a native and citizen of Germany, who last entered the United States at New York, New York, on February 18, 1956. At the time of his last entry, the appellant was admitted as a non-immigrant visitor for business until May 20, 1956. The appellant has received no extensions of stay and has failed to depart from the United States on or before May 20, 1956, the date of expiration set for his authorized stay, and has remained in this country continuously since his last entry.

In his decision [Ex. A] the Special Inquiry Officer found that appellant was amenable to deportation under the Immigration and Nationality Act on the following grounds, to wit, he was in violation of 241(a)(9) of the Immigration and Nationality Act in that under said Section the appellant was subject to deportation, in that, after admission as a nonimmigrant under Section 101-(a)(15) of said Act, he failed to maintain the nonimmigrant status in which he was admitted or to comply with the conditions of such status. These Sections of the Immigration and Nationality Act are set out in full under the paragraph entitled "Statutes Involved" *supra*.

In his decision [Ex. A] the Special Inquiry Officer stated that although it appeared from the evidence of record that the appellant was statutorily eligible for the privilege of voluntary departure in lieu of deportation, the record failed to present sufficient factors to warrant the grant of voluntary departure. Accordingly, as a matter of administrative discretion, the Special Inquiry Officer denied the application for voluntary departure.

Summary of Argument.

I.

There is reasonable, substantial and probative evidence in the administrative record in evidence, which was reviewed by the District Court, to sustain the finding that the appellant is deportable on the grounds stated; to wit: Section 241(a)(9) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(9)), in that appellant was admitted as a nonimmigrant and failed to maintain his nonimmigrant status in which he was admitted, or to comply with the conditions of such status.

II.

There was no abuse of discretion by the Immigration and Naturalization Service in denying appellant voluntary departure.

ARGUMENT.

I.

The Record Is Clear That the Appellant Is Properly Deportable Pursuant to Section 241(a)(9) of the Immigration and Nationality Act (8 U. S. C. 1251 (a)(9)) as Being an Alien Who Was Admitted as a Nonimmigrant and Who Failed to Maintain His Nonimmigrant Status in Which He Was Admitted or to Comply With the Conditions of Such Status.

In the Appellant's Designation of Points Upon Which He Relies on Appeal [T. R. 26]; his first point is that there is no reliable, probative or substantial evidence to support the finding of deportability and the denial of voluntary departure in lieu of deportation. In considering the tenability of this proposition we need merely to look at the stipulations contained in Plaintiff's Proposed Pre-trial Order [T. R. 18]. Here we find that the parties stipulate that the appellant is an alien, a native and national of Germany. We find also that the appellant last entered the United States at New York, New York on February 18, 1956. That at the time of his last entry he was admitted as a nonimmigrant visitor for business until May 20, 1956. That he has received no extensions of stay and that he has failed to depart from the United States on or before May 20, 1956, the date of expiration set for his authorized stay, and that instead he has remained in this country continuously since his last entry. On the basis of these stipulations alone we find admissions to all the essential elements of deportability pursuant

to Section 241(a)(9) of the Immigration and Nationality Act. Since the appellant admits these essential elements of deportability under that Section of the Act, the appellee submits that the claim of no reasonable, substantial or probative evidence to support the finding of deportability under Section 241(a)(9) is untenable.

It appears that the appellant bases his claim upon a misunderstanding; viz., that he was mistakenly informed as to the expiration date of his visa. The appellee submits that the appellant was not justified in relying on any such information received as to the expiration date of the visa when the document itself is clear as to the time he must depart from the United States. Further, it appears that he was admitted to the United States for a limited purpose; namely as a visitor for business and that he had been unsuccessful in transacting any business in his particular field, which was the export and import of electric motors and batteries.

For the reasons stated above, it is appellee's contention and position that the order of deportation is supported by reasonable, substantial and probative evidence. This contention seems particularly fortified in the light of the stipulations made by the appellant in the Pretrial Order appearing on page 18 of the Transcript of Record. Any mistake as to the time of departure from the United States, no matter who caused the mistake, appears to appellee to be totally irrelevant and immaterial to the issue at bar.

II.

There Was No Abuse of Discretion by the Immigration and Naturalization Service in Denying Appellant Voluntary Departure.

The record in this case in no way shows that the Special Inquiry Officer abused his discretion in denying the application for voluntary departure. There must be a clear and manifest showing of an abuse of discretion before a court should interfere with the Attorney General's exercise of such discretion.

Tsiang Hsi Pseng v. Albert Del Guercio, 148 Fed. Supp. 803;

United States ex rel Rongetti v. Neelly, 207 F. 2d 281;

Wolf v. Boyd (9th Cir.), 238 F. 2d 249;

Ickes v. Underwood, 141 F. 2d 546;

Moutsos v. Shaughnessy, 149 Fed. Supp 116;

United States ex rel Hintopoulos, et al. v. Shaughnessy, 25 Law Week 4201.

Appellee respectfully submits, on the basis of the foregoing authority, that a clear showing of abuse of discretion is necessary on the record before the court will interfere with the Attorney General's exercise of discretion in such a case. Upon the record of the Immigration and Naturalization Service, which was reviewed by the District Court and which is transmitted to this Court in its original form, it is clearly shown that there was no abuse of discretion. The appellee, in fact, submits that the record in this case shows only a proper exercise of discretion as contemplated by the Immigration and Nationality Act in Section 244(e). Appellee further submits that the Attorney General's policy in exercising his discretion in cases of this nature is expressed in Title 8

Code of Federal Regulations which Regulations are a guide to the Special Inquiry Officers in exercising the discretionary powers granted to the Immigration and Naturalization Service. It appears clear from the record and the facts surrounding this case that the Special Inquiry Officer's denial of voluntary departure was based solely on the fact that there appeared to him to be an insufficient basis for a grant of voluntary departure in this case. In such a situation as this it is submitted that no Court should interfere with the proper exercise of such discretion by the Attorney General.

In summary, therefore, appellee claims first, that the order of deportation was supported by reasonable, substantial and probative evidence as is clearly shown by the record; and second, that the exercise of discretion in denying voluntary departure in this case was a proper exercise of discretion and the record in no way reflects any abuse of said discretion. Further, that a court should not disturb the Attorney General's exercise of discretion unless the record shows a clear and manifest abuse of said discretion in denying voluntary departure.

The Judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

BURTON C. JACOBSON,
Assistant U. S. Attorney,

By BURTON C. JACOBSON,
Attorneys for Appellee.



No. 15578

United States
Court of Appeals
for the Ninth Circuit

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in Bankruptcy of
the Estate of Joseph Esten, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California,
Central Division

FILED

SEP 13 1957

PAUL P. O'BRIEN, CLERK

No. 15578

United States
Court of Appeals
for the Ninth Circuit

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in Bankruptcy of
the Estate of Joseph Esten, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PHILL SILVER,

1680 North Vine Street,
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Hollywood 38, California.

For Appellee:

LESLIE S. BOWDEN,

448 South Hill Street,
Los Angeles 13, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 68324-C

In the Matter of

JOSEPH ESTEN,

Bankrupt.

OBJECTIONS TO TRUSTEE'S REPORT OF
EXEMPT PROPERTY, AND POINTS
AND AUTHORITIES

Comes now the Bankrupt, Joseph Esten, and files this his Objections to the Trustee's Report of Exempt Property.

Bankrupt states that the Trustee has refused to set aside his exempt real property, the property located at 1349-1351 South Mansfield Avenue, Los Angeles, California, for the reason that no proper Declaration of Homestead had been recorded.

Your petitioner states that on or about April 15, 1955, there was filed in the office of the County Recorder, a Declaration of Homestead duly executed by the bankrupt's wife. That said Declaration of Homestead was acknowledged and sworn to in the manner required by law.

That through an error the lot number of the property involved was described as lot "104" whereas in fact the correct lot number was 204. The Declaration of Homestead, however, correctly referred to the tract number, Map recordation and book and page thereof, from the office of the

County Recorder. Said Declaration of Homestead reads as follows:

“Lot 104, Tract 5069, as per Map recorded in [26] Book 56, pages 82-85 of Maps in the office of the County Recorder of said County.”

The petitioner relies upon the following authorities, all of which support his position that the Declaration of Homestead stated, though erroneous as to lot number but is nevertheless valid where other writing matter in the Declaration sufficiently identifies the homestead property. In the within case the property is sufficiently identified by the correct tract number, book and page number of the Maps in the office of the County Recorder.

Your petitioner further states that a copy of a Trustee's Report was mailed to your petitioner's attorney. That your petitioner was not served with a copy thereof; that he did not know that he was required to file written objections to the trustee's report; nor was he so informed by his counsel that it was necessary for him to do so.

That your petitioner has no other assets other than the homestead and that he would suffer great hardship and distress if his homestead is disallowed. That he acquired the property in joint tenancy with his wife and that his wife has a vested separate estate in and to this property.

Wherefore the Bankrupt respectfully asks that he be permitted to file written objections to the Trustee's report and that the property be declared

to be exempt; and for such other and further relief as may be proper.

/s/ JOSEPH ESTEN,
Petitioner. [27]

Points and Authorities Relied Upon by the Bankrupt: Quackenbush vs. Reed, 102 Cal. 493; Estate of Geary, 146 Cal. 105; Stanley vs. Green, 12 Cal. 148, 165; Estate of Ogburn, 105 Cal. 97; Ornbaum vs. His Creditors, 61 Cal. 455; 9 Cal. Jur. Sec. 157, holding that if the property can be identified by the description by a competent surveyor with or without the aid of extrinsic evidence, then the deed is valid. [28]

Duly Verified.

Affidavit of Service by Mail Attached. [29]

[Endorsed]: Filed May 10, 1956.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
WHY DECLARATION OF HOMESTEAD
ON REAL PROPERTY OF BANKRUPT
SHOULD NOT BE REFORMED TO COR-
RECT CLERICAL ERROR

To the Honorable Reuben G. Hunt, Referee in
Bankruptcy:

The Petition of Joseph Esten, Bankrupt, respectfully represents to the court as follows:

I.

That your Petitioner is the Bankrupt in the above-entitled matter.

II.

That Crules R. Cheek is the duly qualified and acting Trustee of the above-entitled estate.

III.

That on September 19, 1955, your Petitioner filed his Petition in Bankruptcy and was adjudged a bankrupt on said date. That said estate is still open.

IV.

That in Schedule B-4 of the Petition in Bankruptcy, your petitioner listed an equity of \$10,-500.00 interest in land located [30] at 1349 South Mansfield Street, Los Angeles, California.

V.

That in Schedule B-5 of the Petition in Bankruptcy your petitioner claimed a homestead exemption in the aforesaid real property under the provisions of Sections 1260 to 1265, inclusive, of the Civil Code of California.

VI.

That on April 24, 1956, the Trustee herein filed his report of exempt property in which the trustee refused to set aside as exempt the real property located at 1349-1351 South Mansfield Avenue, Los Angeles, California, stating as the ground for such refusal that no proper Declaration of Homestead had been recorded with the County Recorder of Los Angeles County.

VII.

That on April 18, 1955, there was filed with the County Recorder, at Homestead Declaration executed by Anna Esten, the wife of the bankrupt. That in said Declaration of Homestead the real property claimed by the bankrupt as exempt was described by lot number as "Lot 104" Tract 5069 as per map recorded in Book 56, pages 82 to 85 of the Maps in the office of the County Recorder of Los Angeles County. That the true description of said property is Lot "204", Tract 5069 as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County.

VIII.

That the error in said Declaration of Homestead in the description of said lot arose in the following manner:

That at the time the bankrupt and his wife purchased said property a typist then in the employ of the Southland Mortgage Corporation did prepare a Deed of Trust and Application for Loan on real estate. That through the mistake of said typist, the description of said property was described in the Application for Loan and in the Deed of Trust as Lot "104" instead of Lot "204". That a copy [31] of said Deed of Trust and Application for Loan containing the erroneous description was handed to the bankrupt and his wife to retain for their files. Subsequently thereto, the error in the description was learned by the typist and a correction made by her in the original deed conveying

the property to the bankrupt and his wife, but said typist failed and neglected to make the correction on the copy which had been given to the bankrupt and his wife. That at the time the wife of the bankrupt was desirous of preparing a Declaration of Homestead she did deliver to her attorney, Phill Silver, the attorney of record for the bankrupt, the copy of the Deed of Trust which had been given to her by the typist in the Southland Mortgage Corporation office, so that her attorney could copy from such Deed of Trust the legal description of the property and insert such legal description in the Declaration of Homestead. That the bankrupt's attorney was not aware at the time his stenographer prepared the Declaration of Homestead that the true description of the property was Lot "204" and not "104". That the wife of the bankrupt herein executed the Declaration of Homestead without being aware, or knowing that the Declaration of Homestead prepared by her attorney contained an incorrect description of the lot number.

IX.

That said Declaration of Homestead was recorded in the official records of the Office of the County Recorder.

X.

Your petitioner alleges that the error in the Declaration of Homestead was made without any knowledge on his part, or any knowledge on the part of the Bankrupt's wife. That your petitioner and his wife have been and still are in the physical

possession of the real property described as Lot 204, Tract 5069.

XI.

That it was the intention of your petitioner and his wife to declare a homestead upon the said real property and to make the said [32] Declaration of Homestead conform to the actual intention of the petitioner and his wife. That it is necessary that the description in the Declaration of Homestead should be amended to conform and be corrected so as to read as follows:

Lot 204 of Tract 5069, as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of said county.

XII.

That it was the intention of your petitioner and his wife to declare a homestead upon the said real property and to make the said Declaration of Homestead conform to the actual intention of the petitioner and his wife.

XIII.

That it is necessary that the description in the Declaration of Homestead should be amended, reformed and corrected so as to read as follows:

Lot 204 of Tract 5069, as per map recorded in Book 56, pages 82 to 85 of Maps in the Office of the County Recorder of Los Angeles County.

XIV.

That your petitioner and his wife have substantially complied with the provisions of the Civil

Code of the State of California, and the Declaration of Homestead recorded by your petitioner and his wife set forth the following facts:

1. That your petitioner was a married woman and that her husband's name is Joseph Esten;

2. That she was residing on the land and premises erroneously described as Lot 104, Tract 5069;

3. That she claimed the land together with the dwelling house thereon as a homestead; [33]

4. That her husband had not made any declaration of homestead and that she therefore made this Declaration for the joint benefit of herself and her husband;

5. That she estimated the cash value of the land and premises to be \$21,000.00;

6. That no former declaration of homestead had been made by her or by her husband;

7. That the character of the property sought to be homesteaded was a duplex.

XV.

That the Declaration of Homestead was duly signed and executed by the wife of the bankrupt, acknowledged before a Notary Public and recorded in the County Recorder's office of Los Angeles County. That your petitioner and his wife were unaware of the mistake in the description of the real property in the homestead until the Trustee in Bankruptcy filed his report of exempt property and they were notified of this fact for the first time by the attorney for your petitioner in this bankruptcy proceeding.

XVI.

That there is no adequate remedy at law to enable the petitioner herein to accomplish the remedy that he is petitioning for and that it is essential in order to protect the rights of the bankrupt that the Declaration of Homestead be reformed to set forth the truth and correct description to conform with the intentions of the parties.

Wherefore, your petitioner prays that an order be made directing the trustee to show cause why an order should not be made, as follows:

1. Reforming the mistake in the description of the property in the Declaration of Homestead to read: Lot 204 instead of 104, to carry out the intentions of all the parties thereto as of the date of their execution and recording;

2. Allowing the homestead to be set aside to your petitioner and ordering the trustee to prepare and file an amended report of [34] exempt property, correcting his former report by inserting the correct description of said real property in the report; and

3. For such other and further relief as to the court may seem proper.

/s/ JOSEPH ESTEN,
Petitioner.

/s/ PHILL SILVER,
Attorney for Petitioner. [35]

Duly Verified. [36]

[Endorsed]: Filed October 9, 1956.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY DECLARATION OF HOMESTEAD ON REAL PROPERTY OF BANKRUPT SHOULD NOT BE REFORMED TO CORRECT A CLERICAL ERROR

The Bankrupt, Joseph Esten, having filed his verified petition to obtain and secure from this court an Order to Show Cause why the Declaration of Homestead on the real property of the bankrupt should not be reformed to correct a clerical error and why the Trustee's report of Exempt Property should not be amended to conform therewith, and good cause being shown therefor,

It Is Hereby Ordered that the Trustee herein, Crules R. Cheek, show cause, if any he has, before this court in the courtroom of Reuben G. Hunt, Referee in Bankruptcy, on the 24th day of October, 1956, at the hour of 2:00 p.m., why an Order should not be made as follows:

1. Reforming the mistake in the description of the Declaration of Homestead to read Lot 204 of said tract, instead of lot 104 of Tract 5069;

2. Allowing the Homestead Exemption to be set aside to your petitioner and ordering the Trustee to prepare and file an Amended Report of Exempt Property correcting his former report by inserting the [37] corrected description of said real property therein.

It Is Further Ordered that a copy of the Petition for Order to Show Cause and a copy of this

Order to Show Cause be served upon the Trustee, Crules R. Cheek, and the Attorney for the Trustee, Leslie S. Bowden, by United States Mail not later than five (5) days prior to the date set for the hearing of this Order to Show Cause.

Dated: October 10th, 1956.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy. [38]

[Endorsed]: Filed October 10, 1956.

[Title of District Court and Cause.]

RESPONSE OF TRUSTEE

Comes now the Trustee in the above entitled matter and answering the petition of the bankrupt herein, alleges as follows:

I.

Your Trustee has not sufficient information and belief with which to answer Paragraphs VIII, X, XI, XII, XIII, XIV, XV and XVI of petitioner's petition, and basing his answer on such lack of information and belief, denies each and every allegation contained therein.

And as a Further, Separate and Distinct Defense to Said Petition, Your Trustee Alleges:

I.

That at the time of the filing of the petition in bankruptcy herein, no valid homestead had been declared in accordance with the Statute of the State of California and immediately upon the adju-

dication in bankruptcy herein, the title of the bankrupt passed to your Trustee, and your Trustee ever since and now is the owner of an undivided one-half interest in and to the real property described [39] in the petition of the bankrupt upon which he now seeks to claim an exemption.

Wherefore, your Trustee prays that the petition of the bankrupt be dismissed, and for such other and further order as may be proper in the premises.

/s/ CRULES R. CHEEK,
Trustee,
/s/ LESLIE S. BOWDEN,
Attorney for Trustee. [40]

Duly Verified.

Affidavit of Service by Mail attached. [41]

[Endorsed]: Filed October 24, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on regularly for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy, on November 21, 1956, at 2:00 o'clock p.m. Phill Silver appeared as attorney for the bankrupt and Leslie S. Bowden appeared as attorney for the Trustee and the Trustee having been served with a copy of the Petition and Order to Show Cause and the matter having been submitted to the court for decision, the court finds the facts as follows:

Findings of Fact

1. That each and every allegation contained in paragraphs I through XVI, inclusive, of the Petition for Order to Show Cause are true;

2. That it is true that it was the intention of your petitioner and his wife to declare a homestead upon Lot 204, Tract 5069 as per map recorded in Book 56, pages 82 to 85 of the Maps in the office of the County Recorder of Los Angeles County;

3. That it is true that it is necessary that the description in the Homestead should be amended, conformed and corrected so as to read: Lot 204, Tract 5069, as per map recorded in Book 56, pages [42] 82 to 85 of maps in the office of the County Recorder of Los Angeles County.

Conclusions of Law

From the foregoing Findings of Fact the court concludes as follows:

1. That Joseph Esten, Bankrupt, is entitled to a Judgment of Reformation of the Declaration of Homestead executed by Anna Esten on April 18, 1955, and recorded in the office of the County Recorder on said date, reforming and correcting the description therein according to the real intent of the parties to read as follows:

Lot 204, Tract 5069, as per map recorded in Book 56, pages 82 to 85, of maps in the office of the County Recorder of Los Angeles County, also described as 1349-1351 South Mansfield Avenue, Los Angeles, California.

2. That the bankrupt is entitled to an order directing the Trustee to execute and deliver any and all documents that are necessary to accomplish and carry out the terms and conditions of the petition for the Order to Show Cause.

3. That Joseph Esten, the bankrupt, is entitled to an Order directing the Trustee, Crules R. Cheek, to prepare and file an Amended Report of exempt property, setting aside as exempt to the bankrupt the property described as Lot 204, Tract 5069, as per map recorded in Book 56, pages 82 to 85 in the Maps of the Office of the County Recorder of Los Angeles; also described by street and number as 1349-1351 South Mansfield Avenue, Los Angeles, California.

Dated this 11th day of December, 1956.

/s/ BENNO M. BRINK,

Benno M. Brink, Referee in Bankruptcy, Acting
for Reuben G. Hunt, Referee in Bankruptcy.

[Endorsed]: Filed December 11, 1956.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 68,324-C

In the Matter of

JOSEPH ESTEN,

Bankrupt.

JUDGMENT AND ORDER REFORMING
DECLARATION OF HOMESTEAD

The Bankrupt, Joseph Esten, having filed his Petition for an Order to Show Cause why the Declaration of Homestead on the real property of the bankrupt should not be reformed to correct a clerical error therein and to require the trustee to prepare and file an amended report of exempt property, and due notice having been given of the hearing on said Petition and a hearing having been had thereon before the Honorable Benno M. Brink, Referee in Bankruptcy on November 21, 1956 at 2:00 p.m., Phill Silver appearing as attorney for the Bankrupt, and the court having considered the Petition of the Bankrupt and being fully advised in the premises and having filed herein its written Findings of Fact and Conclusions of Law and having directed that Judgment be rendered in accordance therewith,

Now, therefore, by reason of the law and Findings aforesaid, it is hereby Ordered, Adjudged and Decreed as follows:

1. That the Petition for an Order to Reform the Declaration of Homestead on the real Property

of the Bankrupt be, and the same is, hereby granted. [44]

2. That the Declaration of Homestead executed by the wife of the Bankrupt on April 18, 1955, and recorded in the office of the County Recorder on said date be, and the same is, hereby reformed and corrected according to the real intent of the parties so that the description therein shall read as follows:

Lot 204, Tract 5069, as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County; also described as 1349-1351 South Mansfield Avenue, Los Angeles, California.

3. That Crules R. Cheek, the Trustee, shall execute and deliver to the Bankrupt any and all documents that are necessary to accomplish and carry out the terms of this judgment and order.

4. That the Trustee, Crules R. Cheek, prepare and file an amended report of exempt property correcting his former report by inserting the corrected description of said real property and setting aside as exempt, said real property.

5. That the Trustee is authorized and empowered to do all things necessary to accomplish and carry out the terms and conditions of this order.

Dated: December 11, 1956.

/s/ BENNO M. BRINK,

Benno M. Brink, Referee in Bankruptcy, Acting
for Reuben G. Hunt, Referee in Bankruptcy.
Affidavit of Service by Mail attached. [46]

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To Benno M. Brink, Esquire:

The petition of Crules R. Cheek, Trustee of the above named bankrupt estate, respectfully represents:

1. Your petitioner is aggrieved by the order herein of Benno M. Brink, Referee in Bankruptcy, dated December 11, 1956, a copy of which order is annexed hereto, marked "Exhibit A" and made a part hereof.

2. The Referee erred in respect to said order in that the Referee's finding numbered 1 that the petitioner and his wife have substantially complied with the provisions of the Civil Code of the State of California, was clearly erroneous.

3. The Referee erred in respect to said order in his conclusion of law numbered 1, that Joseph Esten, Bankrupt, is entitled to a judgment of reformation of the Declaration of Homestead executed by Anna Esten on April 18, 1955, and recorded in the office of the County Recorder on said date, reforming and correcting the description therein according to the real intent of the parties hereto, as follows: Lot 204, Tract 5069 as per map [47] recorded in Book 56, pages 82 to 85 of the Maps in the office of the County Recorder of Los Angeles County.

4. The Referee erred in respect to said order in his conclusion of law numbered 2, that the bankrupt is entitled to an order directing the Trustee

to execute and deliver any and all documents that are necessary to accomplish and carry out the terms and conditions of the petition for the order to show cause.

5. The Referee erred in respect to said order in his conclusion of law numbered 3 that Joseph Esten, Bankrupt, is entitled to an order directing the Trustee, Crules R. Cheek, to prepare and file an amended report of exempt property, setting aside as exempt to the bankrupt, the property described as "Lot 204, Tract 5069, as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles; also described by street and number as 1349-1351 South Mansfield Avenue, Los Angeles, California."

6. The Referee erred in respect to said order in that said order is contrary to the law of the State of California.

Wherefore, your petitioner prays that said order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said order be reversed, and that your petitioner have such other and further relief as is just.

Dated: December 19th, 1956.

/s/ CRULES R. CHEEK,

Petitioner,

/s/ LESLIE S. BOWDEN,

Attorney for Petitioner. [48]

[Note: Exhibit A "Judgment and Order" is set out at pages 17-18.]

[Endorsed]: Filed December 19, 1956.

United States District Court, Southern District
of California, Central Division

No. 68,324-WM In Bankruptcy

In the Matter of

JOSEPH ESTEN,

Bankrupt.

ORDER ON REVIEW OF REFEREE'S OR-
DER OF DECEMBER 11, 1956 REFORM-
ING A DECLARATION OF HOMESTEAD

Upon the petition for review filed by the trustee on December 19, 1956; upon the certificate of the Referee Benno M. Brink, filed January 9, 1957; and upon the proceedings had before the Referee as appear from his certificate; and it appearing to the court that:

(1) "the [homestead] exemption here in question is defined by California law * * * [and] the Bankruptcy Act declares the policy of Congress to give effect to state exemption laws" [Gardner v. Johnson, 195 F. 2d 717, 719 (9th Cir. 1952); Lynch v. Stotler, 215 F. 2d 776, 778 (9th Cir. 1954); 11 U.S.C. § 24];

(2) since the declaration of homestead filed before the petition in bankruptcy does not describe the property upon which the bankrupt resided, but instead mistakenly and clearly describes another [51] lot in the same tract, this declaration of homestead does not substantially comply with the statutory and necessary requirement that "the declaration of homestead must contain: * * * a de-

scription of the premises" [Cal. Civ. Code § 1263]; and so no notice of claim of homestead exemption was thereby given [Harris v. Duarte, 141 Cal. 497, 75 Pac. 58 (1903); Carey v. Douthitt, 140 Cal. App. 409, 35 P. 2d 632 (1934); see also: Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421, 422 (1908); Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436 (1888); Oktanski v. Burn, 138 Cal. App. 2d 419, 291 P. 2d 954, 956 (1956); Rich v. Ervin, 86 Cal. App. 2d 386, 194 P. 2d 809, 812 (1948); cf: Johnson v. Brauner, 131 Cal. App. 2d 713, 281 P. 2d 50, 56 (1955); In re Kossack, 113 F. Supp. 884 (S. D. Cal. 1953)];

(3) inasmuch as the trustee in bankruptcy is "vested by operation of law with the title of the bankrupt as of the date of the filing the petition" in bankruptcy [11 U.S.C. § 110], the trustee's interest in the bankrupt's property cannot be altered by the filing of a declaration of homestead under California law after the petition in bankruptcy has been filed; hence the second declaration of homestead at bar, filed by the bankrupt's wife as owner of an undivided one-half interest in the bankrupt's residence, could not affect the trustee's undivided one-half interest in the bankrupt's residence [Schuler-Knox Co. v. Smith, 62 Cal. App. 2d 86, 144 P. 2d 47 (1943)]; [52] Sampsell v. Straub, 194 F. 2d 288 (9th Cir. 1951), cert. denied, 343 U. S. 927 (1952)]; and

(4) it is not possible, under the California law, to reform retroactively a defective declaration of homestead, which mistakenly failed substantially

to comply with statutory requirements, into a valid declaration of homestead [*Carey v. Douthitt*, supra, 140 Cal. App. at 412, 35 P. 2d at 633; see *Harris v. Duarte*, supra, 141 Cal. 497, 75 Pac. 58; *Gross v. Strelitz*, 54 Cal. 640 (1880); cf. Cal. Civ. Code § 3399].

It Is Ordered that the Referee's order under review, dated December 11, 1956, reforming the first declaration of homestead, is hereby reversed.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on

- (1) Referee Benno M. Brink;
- (2) the attorney for the Trustee; and
- (3) the attorney for the Bankrupt.

April 3, 1957.

/s/ WM. C. MATHES,

United States District Judge. [53]

[Endorsed]: Filed April 3, 1957. Docketed and Entered April 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court and to
Leslie S. Bowden, Attorney for Crules R.
Cheek, Trustee in Bankruptcy:

Please take notice that the bankrupt, Joseph Esten, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order on review of Referee's Order of December 11, 1956, docketed and entered April 4, 1957, in favor of

Crules R. Cheek, Trustee in Bankruptcy, and
against Joseph Esten, the bankrupt.

Dated this 13th day of April, 1957.

/s/ PHILL SILVER,

Attorney for Bankrupt. [54]

Affidavit of Service by Mail attached. [55]

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 60, inclusive, containing the original:

Petition in Bankruptcy;

Order of Adjudication and of General Reference;

Objections to Trustee's Report of Exempt Property and Points and Authorities;

Petition for Order to Show Cause why Declaration of Homestead on Real Property of Bankrupt Should Not Be Reformed to Correct Clerical Error;

Order to Show Cause why Declaration of Homestead on Real Property of Bankrupt Should Not Be Reformed to Correct a Clerical Error;

Response of Trustee;

Findings of Fact and Conclusions of Law;

Judgment and Order Reforming Declaration of Homestead;

Petition for Review;

Order on Review of Referee's Order of December 11, 1956 Reforming a Declaration of Homestead;

Notice of Appeal;

Designation of Records;

Statement of Points Upon Which Appellant Intends to Rely;

C. Bankrupt's exhibit A, Trustee's exhibit 1, and Anna Esten's exhibit A (for identification only).

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 24th day of May, 1957.

[Seal] JOHN A. CHILDRESS,

Clerk,

By /s/ CHARLES E. JONES,

Deputy.

[Endorsed]: No. 15578. United States Court of Appeals for the Ninth Circuit. Joseph Esten, Appellant, vs. Crules R. Cheek, Trustee in Bankruptcy of the Estate of Joseph Esten, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 25, 1957.

Docketed: June 10, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15578

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee, Respondent.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

I.

The United States District Court erred in determining that the Declaration of Homestead does not substantially comply with the statutory requirement that the Declaration of Homestead must contain a description of the premises.

II.

The Court erred in determining that the Referee's Order, dated December 11, 1956, reforming the Declaration of Homestead could not be reformed.

Dated: This 19th day of July, 1957.

/s/ PHILL SILVER,

Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 22, 1957. Paul P. O'Brien,
Clerk.

No. 15578

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in Bankruptcy of the Estate
of JOSEPH ESTEN, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

LESLIE S. BOWDEN,

448 South Hill Street,
Los Angeles 13, California,

Attorney for Appellee.

FILED

JAN 23 1938

PAUL P. O'BRIEN, CLERK



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No. 15578

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in Bankruptcy of the Estate
of JOSEPH ESTEN, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

Statement.

Under this heading, Appellant states:

“The facts as found by the District Court [Tr.
p. 6] are as follows:”

and then sets forth the allegations of the Petition filed by the bankrupt before the Referee in Bankruptcy. Apparently, Appellant had incorporated these allegations in the Findings of Fact made by the Referee and in order that there may be no confusion, we desire to state that these facts were found by the Referee in Bankruptcy, whose Order was reversed by the District Court Judge.

Appellant's Summary of Argument.

The statement made by Appellant under this heading is not only misleading, but entirely erroneous as will hereinafter be demonstrated.

The United States District Court properly determined that the Declaration of Homestead herein did not substantially comply with the statutory requirement in that the Declaration must contain a description of the premises.

The Declaration [Trustee's Ex. 1] is substantially as follows:

“KNOW ALL MEN BY THESE PRESENTS: That I, ANNA ESTEN, do certify and declare as follows:

“(1) I am a married woman and my husband's name is JOSEPH ESTEN.

“(2) I am now residing with my family, consisting of My husband, on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows:

“Lot 104, Tract 5069, as per map recorded in Book 56, Pages 82 to 85, of Maps in the office of the County Recorder of said County.

“(3) I claim the land and premises hereinabove described, together with the dwelling house thereon, and its appurtenances, as a Homestead.

“(4) My husband has not made any declaration of homestead. Therefore, I make this declaration for the joint benefit of myself and my husband.

“(5) I estimate the actual cash value of the land and premises hereinabove described to be Twenty-one thousand and No/100 (\$21,000.00) Dollars.

“(6) No former declaration of homestead has been made by me or by my husband, except as follows: NONE.

“(7) The character of said property so sought to be homesteaded is as follows: Duplex.

“IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of March, 1955.

/s/ ANNA ESTEN
(Wife)”

Appellant also states:

“A description of land in a homestead need not be more particular than in a conveyance. Great liberality in this respect will be allowed by the courts. Parol evidence is admissible to identify the land in the event of a description containing an erroneous lot number.”

This statement is not supported by any authority cited by Appellant. How can it be said that a description such as contained in “Trustee’s Exhibit 1,” *supra*, would tend in any manner, shape, or form to convey Lot “204” of Tract No. 5069? This is a definite and certain description of real property not belonging to Appellant and it is contended that this could not be considered a *substantial compliance* with the statute.

ARGUMENT.

It is respectfully contended that the United States District Court, in reversing the Referee's Order, properly held that the Declaration of Homestead did not substantially comply with the statutory requirements. In support of the District Court's decision, the following cases were cited which Appellant refers to in detail under the heading: "*Digest of Cases Cited by the U. S. District Court:*"

Harris v. Duarte, 141 Cal. 497, is a case wherein the declarant did not reside on the land described, which is the situation here.

Carey v. Douhitt, 140 Cal. App. 409, was also a case wherein the declarant recorded a homestead on property upon which she did not reside.

Donnelly v. Tregaskis, 154 Cal. 261, is a case in which no proper description was given and it would be impossible to locate the premises from the description in the declaration.

Schyler v. Broughton, 76 Cal. 524. The Court states at page 525:

"The concurrence of several things are necessary under our statute before exemption can be allowed. Where these several acts have been *substantially performed*, and where the declaration contains *the essence of the statutory requirements*, the construction should be so liberal as to advance the object of the constitution and statute." (Emphasis added.)

Does Appellant contend that where an entirely erroneous description is given that this would constitute "substantial compliance?"

In the case of *Oktanski v. Burn*, 138 Cal. App. 2d 419, the street address of the property was given. Therefore,

the homestead could be located from the street address. No street address is given in the case at bar.

In the case of *King v. Gotz*, 70 Cal. 236, the homestead included other property and, therefore, it could be identified.

In the case of *Rich v. Erwin*, 86 Cal. App. 2d 386, the court stated at page 390:

“Where the *required acts* have been substantially performed, the construction of the declaration should be liberal, but there must be a *substantial compliance* or the declaration will be *strictly construed*. The statement of an untruth relative to an exemption requirement vitiates the document as the declaration must contain certain information.” (Emphasis added.)

In the case of *Johnson v. Brauner*, 131 Cal. App. 2d 713, no question of description was involved and the court merely held that the omission of the statement that “she therefore makes the declaration for their joint benefit” did not invalidate the declaration.

In the case of the *Estate of Fath*, 132 Cal. 609; *Estate of Kachigian*, 20 Cal. 2d 787; and *Marelli v. Keating*, 208 Cal. 528, a liberal construction of the homestead and facts was adopted, but in neither of these cases was the description erroneous.

The cases referred to by Appellant from *Johnson v. Brauner*, *supra*, are also in the same category, except for the *Estate of Gcary*, 146 Cal. 105, in which case the statement was made that the land described was a lot of 160 acres “on which I now reside with my family” and could be identified by inquiry.

Simonson v. Burr, 121 Cal. 582, adopted the language used in *Schyley v. Broughton*, *supra*, and did not involve an erroneous description of the property.

In *Greenlee v. Greenlee*, 7 Cal. 2d 579, the parties were actually residing on the property at the time plaintiff executed the homestead. No question was raised as to the description.

In *Phelps v. Loop*, 64 Cal. App. 2d 332, the property involved was an apartment house and no question of the description was involved.

Gregg v. Bostwick, 33 Cal. 220, involved property which was used also as a place of business and there was no question about the description.

Keyes v. Cyrus, 100 Cal. 322, involved a case where the probate court set aside a probate homestead and no question of the description was raised.

In *Feintech v. Weaver*, 50 Cal. App. 2d 181, the declaration contained an erroneous recital that declarant was head of a family. No question of description was involved.

Parker v. Riddell, 41 Cal. App. 2d 908, was a case in which the location and character of the property was properly stated.

Beaton v. Reid, 111 Cal. 484, involved the validity of an execution upon the homestead and no question of description was involved.

Oktanski v. Burn, 138 Cal. App. 2d 419, is a case in which the declaration covered other property including the homestead and the description was correct.

Johnson v. Branner, 131 Cal. App. 2d 713. The only question involved was whether or not the declaration should contain a statement that it was made for the joint benefit of husband and wife.

In the case at bar the Declaration, it is true, described the property by its Tract number and the Map and Book wherein the Tract was recorded, but no claim is made that the property upon which the Appellant resided was the only lot in the Tract. If such were the case, the ruling might be different.

Appellant states on page 18 of his opening brief:

“ . . . and that the Appellant and his wife were actually residing on the property when the Declaration was filed.”

This is a misstatement, as the Declaration [Trustee's Ex. 1] states that the Declarant was actually residing on Lot 104 of said Tract.

We have no quarrel with Appellant when he states that certain cases have upheld a homestead when the declaration referred to a “larger area”, because the larger area contained the description of the premises and the same could be located from a reference to the declaration.

Appellant states on page 19 that:

“It Is Not Necessary That a Description of Land in a Homestead Declaration Should Be More Particular Than in a Conveyance.”

We do not deem it necessary to refer to the numerous cases cited by Appellant under this heading, as we respectfully contend they are not in point and that not one of said cases holds anything different from the cases cited under the liberal construction rule.

The general principle of law enunciated by the cases and Section 2077 of the Code of Civil Procedure is that the description is sufficient if it can be rendered certain by extrinsic evidence; that it must be described so as

to be capable of identification. That is not the case here. As previously pointed out, the property was erroneously described as Lot 104, upon which the Declarant stated that she was residing with her family, whereas, in fact, she, was residing on Lot 204. No extrinsic evidence could identify the property from the description contained in the Declaration. If the Declaration here contained the street number, the rule would be otherwise, because in that event the actual property upon which the Declarant and her family were residing could easily be identified and located. In any event, we are not here concerned with a problem arising between a grantor and a grantee. Here, creditors rights are involved and because of the wrong description, the creditors had no notice of the filing of the Declaration.

A Declaration of Homestead Cannot Be Reformed Retroactively.

The Civil Code of the State of California provides as follows:

“Sec. 3399. When Contract May be Revised. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.”

It is contended that a Declaration of Homestead does not come within the provision of the section quoted for the reason that it is not a contract, but a mere notice.

We believe that the rules applied to mechanic's liens are applicable for the reason that a declaration of homestead can only be construed as a notice, and if a notice is defective, the only remedy is to give a new notice.

Madera Flume, etc. Co. v. Kendall, 120 Cal. 182, is a case in which an attempt was made to reform a notice of mechanic's lien and the court, at page 183, stated:

"The notice of its claim filed by the plaintiff was not sufficient to authorize an enforcement of the lien. . . . The notice of lien which is filed for record must be complete in itself at that time in order to authorize its enforcement and is not capable of being amended or reformed."

Goss v. Strelitz, 54 Cal. 640;

Fernandez v. Burleson, 110 Cal. 164.

In any event, here creditors rights have intervened and the title to the undivided one-half interest in the property was vested in the Trustee as of the date of the filing of the Petition in Bankruptcy.

From an examination of the cases cited by Appellant, it is difficult to understand how *Carey v. Douhitt*, *supra*, is in conflict with *Oktanski v. Burn*, *supra*, or *Donnelly v. Tregaskis*, *supra*. In the *Oktanski* case the street address was given and in the *Donnelly* case the description was given as:

" . . . being lot No. 14 in block No. 266 according to the map of said Vallejo made by C. R. Rowe, Surveyor."

It appeared that no such map was of record and the court stated at page 264:

" . . . where a description is dependent for its sufficiency upon some other instrument, such as a

map, the map properly identified must be produced, or in some manner established, or the description must fail.”

By inference, Appellant suggests that there is a “latent ambiguity” in the description used in the Declaration here. However, he has failed to point out where the ambiguity exists. We contend that the description is certain and positive and is not subject to any rule regarding latent ambiguity.

The Parol Evidence Rule Is Not Applicable in This Case.

Appellant has cited no cases holding that the parol evidence rule is applicable to correct a wrong description of the premises. The following cases cited by Appellant could not apply here:

In *Re Kossack*, 113 Fed. Supp. 884, the only question involved was whether or not the homestead was good where the declarants did not place their signatures at the end of the purported declaration.

Steward v. United States, 316 U. S. 353, is not in point as the description could be made certain from the document itself.

Carter v. Bacigalupi, 83 Cal. 187, involves the description of a mining claim and the court, in holding that the description was sufficient, stated at page 190:

“It is argued, however, that the center line is not sufficiently described, but if either end of the line may be located, the other may be found.”

Redd v. Murry, 95 Cal. 48, refers to a deed, the description in which could be made certain by the production of a map referred to in the deed.

Reamer v. Nesmith, 34 Cal. 624, is not in point and counsel has only quoted a portion of the statement made by the court in admitting extrinsic evidence. We quote in full from page 626:

“For the purpose of determining the question it was competent to ascertain by extrinsic evidence the precise location of the land in dispute, for in no other way can effect be given to the deed by applying it to the subject matter. Parol evidence was, therefore, admissible—the true location of the ground in dispute having been agreed upon, or otherwise ascertained—to show the true location of all the descriptive designations and calls named in the deed. This being done, it will be found that all of the descriptive terms found in the deed apply to the land in dispute, or that they do not; if the latter, the land has not passed by the deed; but if some of them apply to the land and the others do not, then, if those which do apply describe the land with sufficient certainty, the land is passed, for those which do not apply may be rejected as false.”

The rule here set forth cannot be applied in the case at bar, as no extrinsic or parol evidence could be introduced to prove that the descriptive terms found in the homestead apply to the land in dispute, that is to Lot 204.

In *Blume v. MacGregor*, 64 Cal. App. 2d 244, cited by Appellant, the court stated at page 251:

“In general, if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient.”

Does Appellant contend that this rule could be applied here? As stated before, taking the description contained

in the Declaration, no one could find the property upon which the Declarant resided.

The Bankruptcy Court Has No Jurisdiction or Power to Order Reformation of a Declaration of Homestead.

As heretofore pointed out, it is contended there has been no substantial compliance with the statutory requirements as to description.

Appellant refers to *Fowler v. Hart*, 14 L. Ed. 186 (13 How. 373). This case involved a mortgage and it is respectfully contended that a mortgage is a contract between two parties and is, therefore, subject to reformation. A declaration of homestead is not a contract.

Hanlon v. Western Loan, 46 Cal. App. 2d 580, referred to a deed of trust which is also a contract.

Gardner v. Johnson, 195 F. 2d 717, merely states the general policy of Congress regarding exemptions and does not effect the requirements of the state statutes regarding substantial compliance. Appellant states at page 36:

“ . . . and that finally that portion of the homestead which contained the incorrect lot number could be properly disregarded by the Referee.”

If this were done, the description would read:

“Tract No. 5069, as per map recorded in Book 56, Pages 82 and 85, of Maps in the office of the County Recorder of said County.” [Trustee's Ex. 1.]

It is apparent from such a description, no lot could be located in Tract No. 5069.

Conclusion.

We believe that we have demonstrated, and likewise Appellant has demonstrated in his Brief, the following principles applicable to the homestead laws of the State of California.

1. The declaration must contain a description of the premises sufficient to identify the same, with or without the aid of extrinsic evidence.

2. Substantial compliance with the homestead laws does not apply where there has been a wrong description of the premises contained in the declaration of homestead, and

3. A declaration of homestead is not a contract and is, therefore, not subject to reformation.

For the foregoing reasons, the Order of the District Court should be affirmed.

Respectfully submitted,

LESLIE S. BOWDEN,

Attorney for Appellee.

No. 15578

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in
Bankruptcy of the Estate of Joseph
Esten, bankrupt,

Appellee.

BRIEF FOR THE APPELLANT

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PHILL SILVER
1680 North Vine Street
Hollywood 28, California

FILE

DEC 2 195

PAUL P. G. ESTEN

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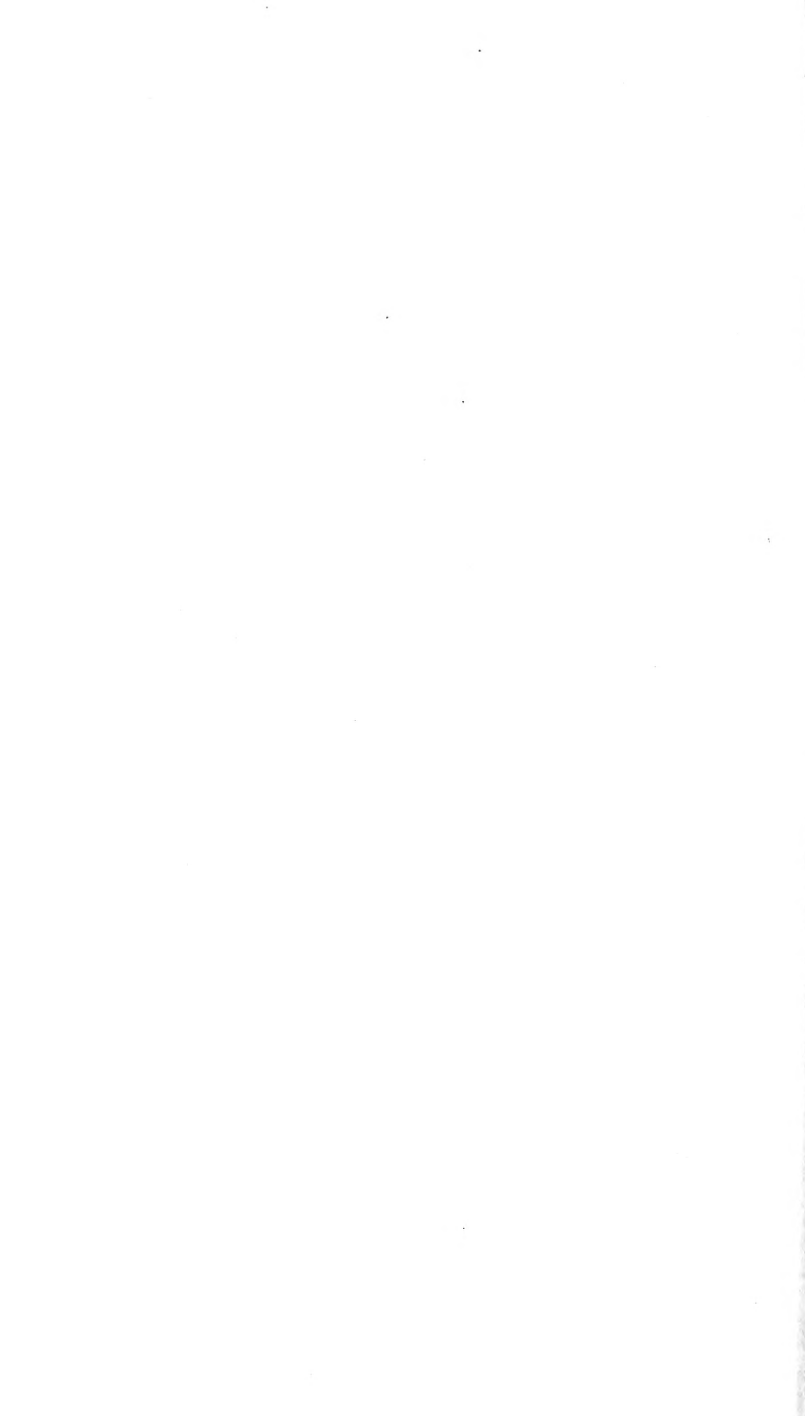


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IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in
Bankruptcy of the Estate of Joseph
Esten, bankrupt,

Appellee.

BRIEF FOR THE APPELLANT

OPINION BELOW

The Order on review of the Referee's Order is attache
hereto as an appendix.

JURISDICTION

The Order of the United States District Court followed
petition for a review of an Order made by the Referee in Bank
ruptcy in the United States District Court, Southern District of
California. The Order of the United States Court was entered

on April 4, 1957. Notice of Appeal to this court was filed April 15, which was within sixty days.

QUESTIONS PRESENTED

1. Did the United States District Court err in determining that a Declaration of Homestead, which contained an incorrect lot number but the correct tract number and the correct book number of the maps, in the office of the county recorder did not substantially comply with the statutory requirement that a Declaration of Homestead must contain a description of the premises?

2. Did the United States District Court err in determining that the Referee in Bankruptcy could not order the reformation of the Declaration of Homestead, filed by the wife of the bankrupt, which contained an incorrect lot number

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statutes and other authorities involved are set forth in the Appendix.

STATEMENT

The facts as found by the District Court (Transcript p. 6) are as follows:

That on September 19, 1955 the appellant filed a Petition in Bankruptcy. That in the Petition in Bankruptcy appellant listed an equity in land located at 1349 South Mansfield Street, Los Angeles. That in Schedule B-5 of the Petition in Bankruptcy the appellant claimed a homestead exemption in the aforesaid real property under the provisions of §1260 to 1265 inclusive of the Civil Code of California.

That on April 18, 1955, there was filed with the County Recorder a Homestead Declaration executed by the wife of the appellant. That in said declaration the real property claimed as exempt was described by lot number as Lot 104, Tract 506 as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County. That the true description of said property is Lot 204, Tract 5069 as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County. That the appellant and his wife at the time of the filing of the Petition in Bankruptcy actually resided on Lot 204, Tract 5069. That it was the intention of appellant and his wife to declare a homestead upon said real property.

That on April 24, 1956, the Trustee filed his report of exempt property in which he refused to set aside as exempt said property, stating as the ground for such refusal that no proper Declaration of Homestead had been recorded.

Upon application to the Referee in Bankruptcy praying

for an order reforming the mistake in the description of the property to read Lot 204 instead of 104, and to allow the homestead to be set aside to the appellant, an order was made that the bankrupt is entitled to a judgment of reformation of the Declaration of Homestead executed by appellant's wife on April 18, 1955, reforming the description to read as follows: "Lot 204, Tract 5069, as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County, also described as 1349-1351 South Mansfield Avenue, Los Angeles, California." From this order, the Trustee in Bankruptcy petitioned the United States District Court for a review asking that the order be reversed. That the United States District Court, on April 3, 1957, the Hon. William C. Mathes, judge presiding, made an order reversing the order of the Referee dated December 11, 1956, in which the Declaration of Homestead had been ordered reformed. The appeal is from the order made by Judge Mathes.

SUMMARY OF ARGUMENT

A Homestead Declaration upon which the declarant resides containing the correct tract number and map reference as recorded with the County Recorder, and the name of the city where the land is situated, is a substantial compliance with the requirement that a Declaration of Homestead shall describe the premises.

A description of land in a homestead need not be more particular than in a conveyance. Great liberality in this respect will be allowed by the courts. Parol evidence is admissible to identify the land in the event of a description containing an erroneous lot number.

A bankruptcy court has jurisdiction under its equity power to allow extrinsic evidence to be introduced to identify the homestead premises where there has been substantial compliance and to order, if necessary, reformation to conform to the intention of the declarant.

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT
ERRED IN DETERMINING THAT THE
DECLARATION OF HOMESTEAD DOES
NOT SUBSTANTIALLY COMPLY WITH
THE STATUTORY REQUIREMENT THAT
THE DECLARATION OF HOMESTEAD
MUST CONTAIN A DESCRIPTION OF THE
PREMISES

The District Court in its decision stated:

"Since the declaration of homestead
filed before the petition in bankruptcy does
not describe the property upon which the
bankrupt resided, but instead mistakenly
and clearly describes another lot in the same

tract, this declaration of homestead does not substantially comply with the statutory and necessary requirement that the declaration of homestead must contain: * * * a description of the premises, and so no notice of claim of homestead exemption was thereby given. "

The District Court in a memorandum decision cited a number of cases in support of its conclusion that the declaration as filed was invalid inasmuch as it did not describe the property upon which the bankrupt resided.

A. Digest of Cases Cited by the U. S.
 District Court:

In the first of these cases (Harris v. Duarte, 141 Cal 497) a deed was made conveying the south 10 acres of land of a tract containing 11-1/2 acres. A house was constructed outside of the 10 acres described in the deed. A homestead was filed on this property. The Appellate Court stated that the description in the homestead was the same as the description in the deed and that it did not cover the land upon which the house was situated. The court said, "A declaration of homestead must contain a description of the premises claimed, and a statement that the person making it is residing on the premises described. If the declarant makes a mistake and gives a description of land upon which she does not reside her

statement that she resides upon the land cannot enlarge its boundaries. "

The second case cited by the U. S. District Court was

Carey v. Douthitt, 140 Cal. App. 409 (decided in August, 1934)

The facts were that the homestead claimants owned Lots 7 and 10 of a subdivision according to a map recorded in Imperial County and resided in a house situated upon Lot 10 while the husband conducted a business on Lot 7. The wife executed and recorded a homestead upon Lot 7 alone. An action was brought to quiet title by a judgment creditor. The court in that action rendered judgment permitting the wife to execute and file an amended Declaration of Homestead to include Lot 10. An appeal was taken from that judgment. The Appellate Court in holding the original homestead to be invalid stated that the trial court could not permit the "filing of an amended declaration with retroactive effect".

The next case cited by the U. S. District Court is

Donnelly v. Tregaskis, 154 Cal. 261. In that case a homeste

was declared by the wife on land solely described as a "numbered lot in a numbered block in the City of Vallejo which numbered lot and block are located solely by reference to a map of said Vallejo made by C. W. Rowe, surveyor". The court in holding the homestead invalid said: "No such map was produced in evidence and the negative was shown by the defense to the effect that no such map was of record. In the absence

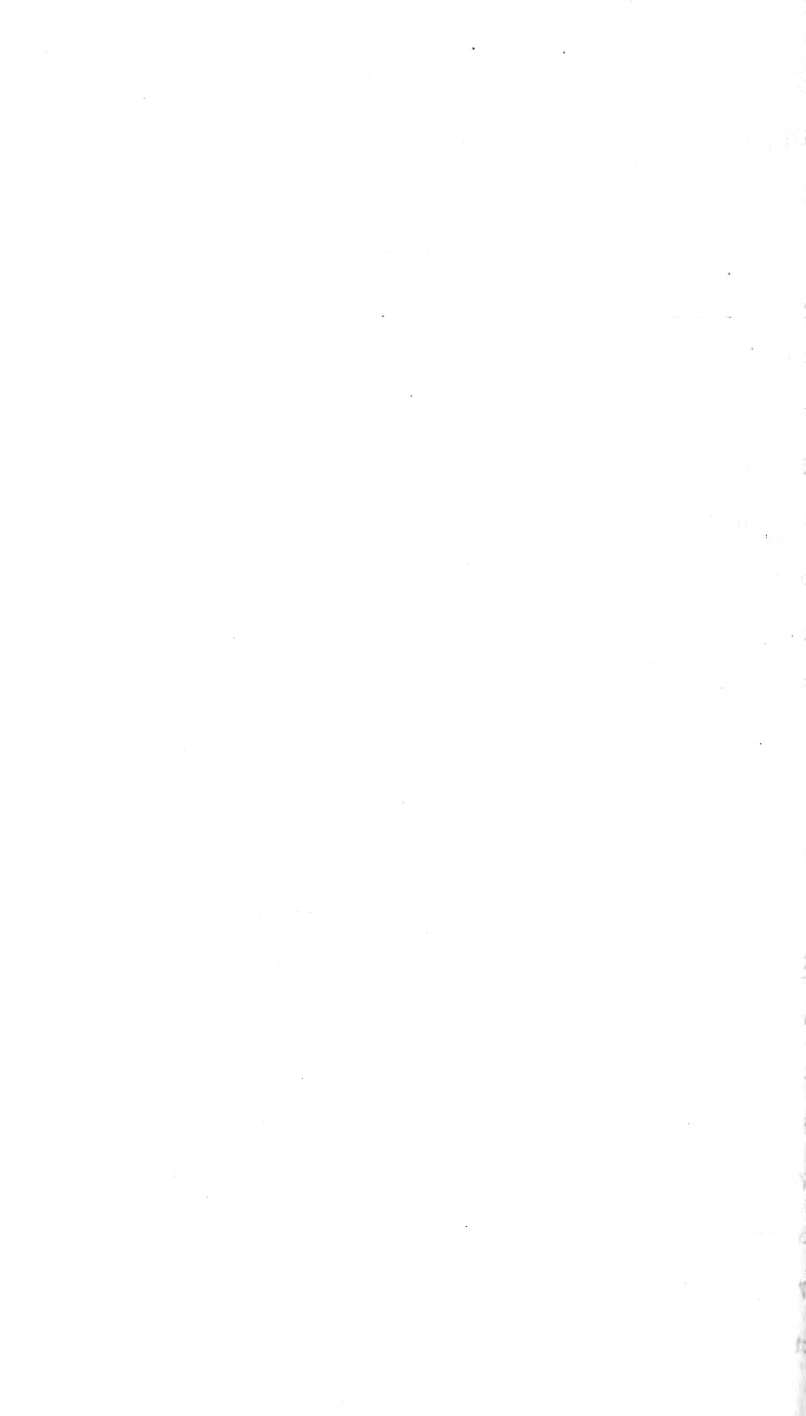
of the production and identification of the map it would be impossible for any person to locate the premises sought to be described".

The next case cited by the District Court was Schyler v. Broughton, 76 Cal. 524. The description of the property to which objection was made was as follows: "The lot of land and premises situated in the Lompoc Valley, County of Santa Barbara, State of California, bounded and described as follow Being the north west quarter of subdivision number 11 as laid down on the official map of Lompoc Valley Land Company's lands, and contains forty acres of land more or less". The Supreme Court in upholding the validity of the homestead said :

"It is not necessary that a description of land in a homestead declaration should be more particular than in a conveyance."

The next case cited by the Court was Oktanski v. Burn, 138 Cal. App. 2d 419. There an action was brought to restrain the sale of certain real property under execution on the ground that the property was homesteaded. In opposition it was alleged that the homestead described the property as 740-742 Juniper Avenue or (improperly) as Lots 1877 and 187 of tract number 5134, whereas the correct description of 740-742 Juniper Avenue was Lot 7, tract 1951. In upholding the homestead the Appellate Court said:

"Errors of description are not

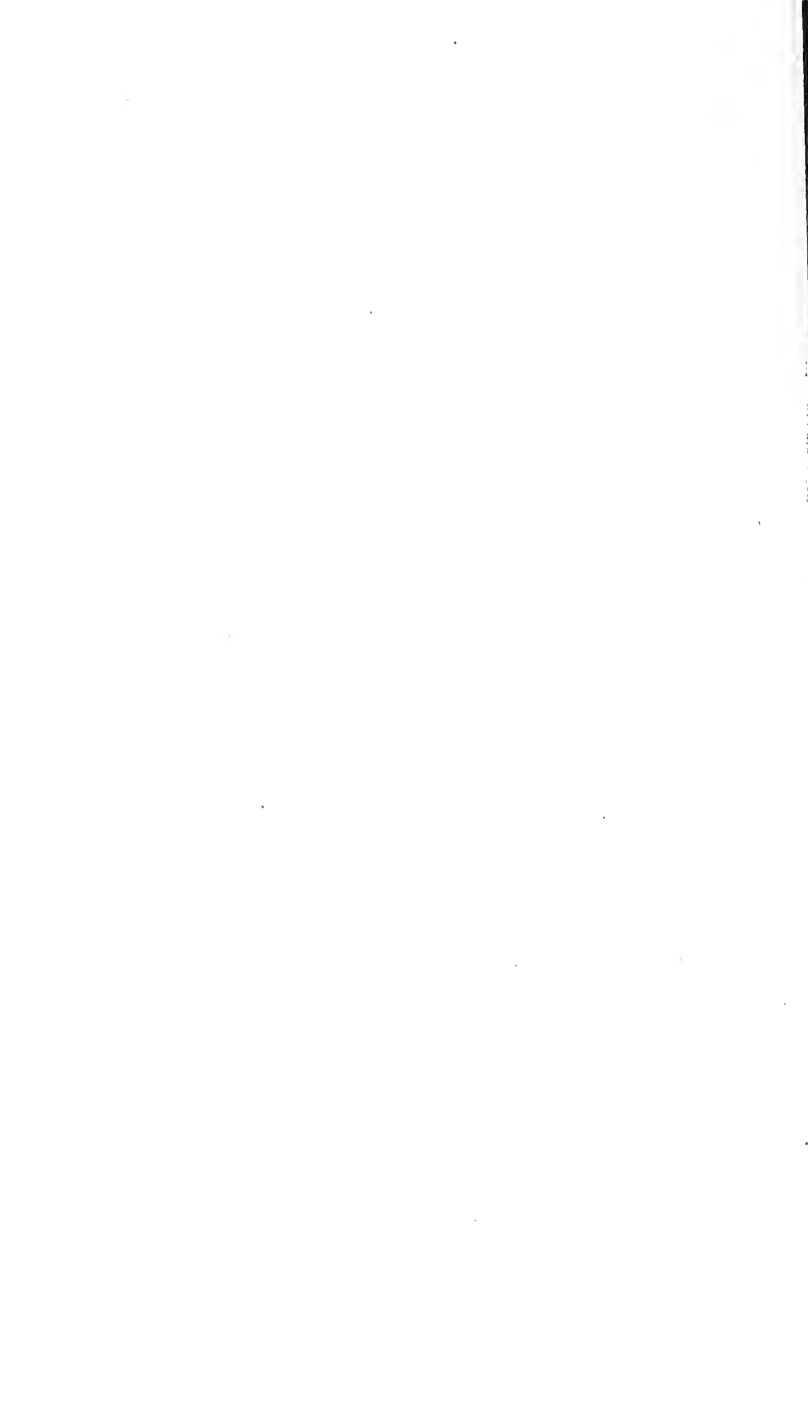


infrequently discovered in conveyances
and other documents relating to real
property. The only purpose of a descrip-
tion is to reasonably identify the property
intended, and the description in a homestead
declaration need not be more particular
than in a conveyance. To uphold homesteads
which are favored by the law", says the
reviewing court in Donnelly v. Tregaskis,
154 Cal. 261, "great liberality in this
respect (description) will be allowed."

(Emphasis added.)

(It is to be noted that the court in the above case
quoted with approval the statement "great liberality in this
respect (description) will be allowed". Whereas in the
earlier case of Carey v. Douthitt, supra, cited by the Distri
Court, (140 Cal. App. 409), the court there had said in a
case involving a wrong description: "The statutory require-
ments must be strictly complied with".)

The court in the Oktanski case cited the case of King
Gotz, 70 Cal. 236, with approval. In that case the homestead
included the whole portion of a lot the front of which was
occupied by tenants. In upholding that homestead the court
there said, "The claim of premises not the subject of a homestead
does not invalidate his claim as to that clearly subject"



to such exemption". (Citing cases.) (Emphasis added.)

The District Court also cited Rich v. Erwin, 86 Cal. App. 2d 386. In that case the homestead contains a statement the declarant is married, whereas he was not married and not the head of a family as claimed. The court held that a valid homestead had not been impressed upon the property in that the statement of an untruth relative to an essential requirement vitiates the document.

The next case cited by the Court was Johnson v. Brauer, 131 Cal. App. 2d 713. That case involved the sufficiency of a declaration of homestead filed by a wife upon property held in joint tenancy. Prior to the filing of the homestead the husband had conveyed his interest to the wife. The homestead did not contain the statutory statement that "she therefore makes the declaration for their joint benefit". An execution was levied on the property and the present suit to quiet title followed. The trial court invoked the doctrine of substantial compliance and held the above statutory phrase was not necessary to a valid declaration.

The Appellate Court in distinguishing the cases which had applied the strict construction rule affirmed the judgment, holding that the rule of liberal construction applies to a declaration of homestead. (Emphasis ours.)

The court in that case also cited numerous substantial performance cases, notably Estate of Fath, 132 Cal. 609, 61



Estate of Kachigian, 20 Cal. 2d 787, 791; Marelli v. Keating, 208 Cal. 528; in each of these cases a liberal construction of the homestead law and facts was adopted by the courts.

Other cases referred to by the court in the Johnson v. Brauner case, in which homesteads were upheld, under the liberal construction rule are the following:

Simonson v. Burr, 121 Cal. 582, where there was no statement that the husband was the head of the family; Southwick v. Davis, 78 Cal. 504, where the acknowledgment omitted the phrase "whose name is subscribed to the within instrument".

Heathman v. Holmes, 94 Cal. 291, where the owner of a building afterwards built a large addition to the building which he leased for hotel purposes.

Parker v. Riddel, 41 Cal. App. 2d 908, where the wife's declaration didn't state that the husband is the head of the family.

Santa Barbara v. Ross, 183 Cal. 657, where the declaration did not state that it contains a statement that the husband has not made a declaration of homestead.

Estate of Geary, 146 Cal. 105, 108, where the land was described as a lot of 160 acres "on which I now reside with my family", then followed by an attempted description by legal subdivisions which after the land was

surveyed was found to be incorrect.

Farley v. Hopkins, 79 Cal. 203, 206, where the statutory phrase "that she therefore makes the declaration for their joint benefit", was omitted.

In Re Statler, 114 F. S. 301, 304: Where the statement, "I estimate the actual cash value of the land and premises herein above described to be _____ (\$____) Dollars" was held to be good as it meant no value.

Michels v. Burkhard, 47 Cal. App. 162, where the trial court found that it had been the actual intention of the wife when she filed the homestead to merely cloud the title for the purpose of harassing her husband.

In each of the foregoing cases the Appellate Court re-affirmed that a rule of liberal construction applies to declaration of homesteads.

B. The Liberal Homestead Construction Rule

In the Johnson v. Brauner case the court also quoted with approval the rule on liberal construction from the case of Simonson v. Burr, 121 Cal. 582, reading as follows:

"The statute in reference to homesteads is a remedial measure and as such is to be liberally construed." And where the several acts

required "have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and statute. "

The liberal construction rule was also stated by the California Supreme Court in Greenlee v. Greenlee, 7 Cal. 2d 579 - 583 as follows:

"The homestead laws have always been given a most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of the legislature. "

In Phelps v. Loop, 64 Cal. App. 2d 332, the Appellate Court there said:

"The tranquility of society and the prevalence of a healthy social order are factors which much have been paramount in the legislative mind in ordaining the right of a family to hold and enjoy without let or hindrance the realty they have designated as their terrestrial abode. "

In Gregg v. Bostwick, 33 Cal. 220, the Supreme Court said:

"The [Homestead] Act is founded upon the idea that it is good for the general welfare that every family should have a home, a place



to abide in a castle where it can find shelter from financial disasters and protection against the pursuit of creditors who have given credit with the full knowledge they cannot cross its threshold. "

The above case was a suit in equity to enjoin an execution sale of property claimed to be exempt as a homestead. The plaintiff resided on a portion of a block consisting of 4 Lots. The declaration claimed "all of block 18 as a homestead". The Supreme Court affirmed the trial court's decision adjudging that the lot upon which plaintiff was residing was exempt and that the remaining portion of "block 18" was not so impressed.

In Keyes v. Cyrus, 100 Cal. 322 - 325, it was said:

"The ultimate object of all legislation respecting the homestead is to protect the family in the right to preserve their home, both from their own improvidence, and also from the rapacity of their creditors; . . . Such statutes, being remedial in their nature, are to be construed liberally, and in favor of carrying out the manifest purpose of the legislature, rather than that their operation be restricted to the strict letter in which they are framed. The policy of such legislation has never been questioned. It is in furtherance of the welfare of the state that its

citizens shall be a permanent body, whose individual interests in its prosperity and development shall, as far as possible, be identified with the public interest. "

The liberal construction rule is also discussed and upheld in Feintech v. Weaver, 50 Cal. App. 2d 181. In that case the declarant filed a homestead form provided for a "head of the family. The declarant was not the head of a family. On appeal the court held that the declaration should be given a liberal construction; that the recital is surplusage and unnecessary; and that there was a valid homestead upon the property. The court added:

"To give this effect to the instrument secures to the defendant the right to a home which the Constitution of our state (Article XVII, §1) enjoins the Legislature to protect. "

In Parker v. Riddell, 41 Cal. App. 2d 908, the court says:

"Such statutes (homestead) are benevolent and remedial in character and may be liberally construed. "

Beaton v. Reid, 111 Cal. 484, where the court said, "the statute providing for and protecting the homestead right is to be construed strongly in favor of its protection".

In Oktanski v. Burn, 138 Cal. App.2d 419, the Appellate Court in rejecting the contention that the homestead was defective because there were two complete descriptions of two entirely different properties, said:

"To adopt appellant's reasoning, however, would tend to defeat rather than to advance their beneficial objects and to carry out the manifest purpose of the Legislature. "

In Johnson v. Brauner, 131 Cal. App.2d 713 - 714, the court said:

"Of course it was necessary for the legislature to provide some manner by which one desiring to claim a homestead should make a public declaration of the fact, and designate the particular premises intended to be so claimed. But surely statutory provisions to that end should not be subjected to the rule of strict construction. Statutes for the purpose of carrying out the constitutional command are remedial, and should be liberally, or at least fairly and reasonably, construed. The homestead right is not one to be industriously pinched, and circumscribed, and circumvented, and beaten back. If the facts of an honest homestead claim be present, a substantial compliance with statutory

provisions about making the claim public should be deemed sufficient. And at page 508: 'When these several acts have been substantially performed, and when the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and the statute.' The policy underlying all homestead legislation, whether providing for the selection of a homestead by a person during his lifetime or by the court for his family after his death, is as stated in Estate of Fath, 132 Cal. 609, 613, 'to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors', and to this end a liberal construction of the law and facts will be adopted by the courts. (Estate of Kachigian, 20 Cal. 2d 787, 791, 128 Pac. 2d 865) This phrase a liberal construction of the law and facts will be adopted by the courts (or

its equivalent) also occurs in Lucci v. United Credit & Collection Co., supra, 220 Cal. at 496 and Marelli v. Keating, 208 Cal. 528, 531, 282 Pac. 793."

In the instant case, it is not disputed that the Declaration of Homestead correctly describes the property by its tract number 5069; that the Declaration correctly refers to the map and book wherein this tract is recorded in the office of the County Recorder of Los Angeles County, and that the appellant and his wife were actually residing on the property when the Declaration was filed.

In the following cases, homesteads have been upheld as to that portion of the land upon which the homestead was situated, although the Declaration of Homestead referred to a larger area.

In a case entitled In Re Crowey, 71 Cal. 300, a homestead was claimed on a tract containing 185 acres. The dwelling house occupied 5 acres. The adjoining 180 acres was leased. The Supreme Court held that there should have been set aside as a homestead the house in which the declarants resided together with 5 additional acres.

In Guernsey v. Douglas, 171 Cal. 329, a homestead was filed on five lots and the court held the homestead was valid as to one of the lots.

Similarly, in the case of Ornbaum v. His Creditors,

61 Cal. 455, a homestead was claimed on "about 1100 acres". The trial court found that the plaintiff with his family resided on said lands at the time he filed said homestead declaration; that he inclosed with a fence about 300 acres thereof; that subsequently three or more persons took up preemption claims of 160 acres, each within the boundaries claimed as a homestead. On appeal, it was objected that the declarant had no actual residence on the land outside of his enclosure. The trial court upheld the homestead, and on appeal the judgment was affirmed.

C. It Is Not Necessary That a Description
 of Land in a Homestead Declaration
 Should Be More Particular Than in a
 Conveyance.

In the case of In Re Ogburn, 105 Cal. 95, it was contended the Declaration of Homestead was void because it described "the property". The description was as follows:

"Situated on Main Street of the Village
of Woodland and being the western part of Lot
No. 5 of said Village, etc. "

The objection was made that the description was insufficient as there is nothing to show the location of Lot 5 and there might be many lots 5 in Woodland. The Supreme Court said:

"This contention cannot be maintained.

The declaration stated that the family then

resided upon the lot and premises sought to be erected into a homestead; and this statement, together with the description which followed, clearly enough designated the premises intended to be claimed as such homestead. This was sufficient." (Emphasis added.)

In Perry v. Ross, 104 Cal. 15, 19, the court said:

"That which is covered by the exemption is the land and not any particular claim to it."

§2077 of the Code of Civil Procedure in part provides as follows:

"Sec. 2077. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars . . .

6. When the description refers to a map, and that reference is inconsistent with



other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars. "

In Stanley v. Green, 12 Cal. 148, at p. 165, the court said:

"A designation of the tract by a particular name or number is sufficient; and if it can be rendered certain by extrinsic evidence, this is as good a description as one by metes and bounds. It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. "

In the Estate of Geary, 146 Cal. 105 - 108, in the Declaration of Homestead the land is first described as "a lot of 160 acres on which I now reside with my family in San Diego County, California", and then followed an attempted description by legal subdivisions, which after the land had been surveyed by the United States Government was found to be incorrect. The description continued as follows: "Said homestead known by the name of Geary's Ranch", etc.

The Supreme Court, in upholding the homestead, said:

"This description by name designated with sufficient certainty the premises intended to be covered by the Declaration of Homestead; and the other erroneous descriptions by legal subdivisions may be disregarded. . . . We think, therefore, that the point that the Declaration of Homestead is void for want of sufficient description of the homestead premises is not tenable."

In Spect v. Gregg, 51 Cal. 198, it was contended the following description in a deed was insufficient, to wit:

"An undivided two-thirds part of the following described tract or parcel of land, to wit: 2 Spanish Leagues of land on the west bank of the Sacramento River, part of the land formerly known as the Colus Tract, including the Town of Colusa . . . "

On appeal, the Supreme Court held that the deed did contain a sufficient description of the land in controversy, "the same being part of the Town of Colusa".

In Haley v. Amestoy, 44 Cal. 132, the principal question in the case arose upon the construction to be given to the description of premises found in a certain deed. The description was as follows:

"All the undivided two-thirds of all the

lands known by the name of Rancho de San Vicente lying and being situated in the County of Los Angeles and State of California. "

Then followed a description by courses, distances and monuments which was erroneous. In holding that the dominant idea in the mind of the grantor when the deed was made was of the Rancho de San Vicente as a whole and not of the particular line or marks by which it might be described, the court said:

"This being so, the deed must be held to convey two-thirds of the whole Rancho, however erroneous may be the particular description. "

In Brusseau v. Hill, 201 Cal. 225, a deed was questioned among other grounds on the ground it contained no description of the property intended to be affected thereby. The language of the deed was: "This is my gift of deed all in my possession to Mr. G. W. Brusseau. " In holding the deed to be valid, the Supreme Court said:

"According to the modern current of authority both in this and other jurisdictions, descriptions of property similar in general terms to that embraced in the foregoing language of the instrument under review have been held susceptible of identification by extraneous evidence, and when so identified sufficient to uphold the



attempted transfer. In the case of *Lick v. O'Donnell*, 3 Cal. 59 (58 Am. Dec. 383), a conveyance of 'one-half of my lot' was upheld upon proof that the grantor owned but one lot in San Francisco, and the instrument was held to convey title to an undivided one-half of such lot. In the case of *Pettigrew v. Dobbelaar*, 63 Cal. 396, the description was 'all land (of grantor) and wherever the same may be situated' and the instrument though executed in Illinois, was held to cover and convey land owned by the grantor in California. In the case of *Staples v. May*, 3 Cal. Unrep. 250 (23 Pac. 710) the description was 'all lands and personal property . . . belonging to said party . . . in Santa Clara county', and it was held that extraneous proof might be offered to locate the lands conveyed within said county. In 9 Cal. Jur., page 306, these and certain other cases are reviewed as upholding the view that 'descriptions of land, general in character, such as "all land and real estate" of the grantor "wherever the same may be situated", or "the land owned by the grantor" in a certain county, or all the grantor's

"right, title and interest" in a certain city,
etc. are good and pass the grantor's interest
in all his real property coming within the
description. ' In Ruling Case Law, volume 8
page 1076, the rule is thus stated: 'Usually
general descriptions, such as "all the estate
both real and personal of the grantor", "all
my land" in a certain town, county or state,
"and my land wherever situated", "all my right,
title and interest in and to my father's estate
at law", and the like, are held good. And a
deed is not void merely because it conveys
all one's property in general terms.' The
evidence in the instant case fully showed that
the piece of real estate described in the com-
plaint herein was the only property which
Charles Kruse owned in the city of Oakland,
and also fully identified it as the property
intended to be covered by the instrument in
question. We are therefore of the opinion
that said instrument was thus shown to be
sufficient in the matter of description to
convey to the plaintiff title to the said property. "

See also 55 A. L. R., p. 162, where numerous other
cases are cited holding a deed describing the subject matter

as all of the grantor's property in a certain locality as not defective or void for want of a sufficient description.

By analogy the declaration in this case in part describe the homestead as follows:

"I am now residing with my family,
consisting of my husband, on the land and
premises located in the City of Los Angeles,
County of Los Angeles, State of California
. . . "

In Leonard v. Osburn, 169 Cal. 157, an action was brought to quiet title. The deed through which defendant claimed title erroneously referred to a certain map. In upholding the deed the Supreme Court said:

"A deed is not void for uncertainty
because of errors or inconsistency in some
of the particulars of the description. "

See also Crouse v. Rogers, 33 Cal. App. 246, where by a contract and a map were incorrectly described, yet the court upheld a conveyance.

In Patch v. White, 117 U. S. 210, the Supreme Court held that latent ambiguity is explainable by extrinsic evidence where a misdescription consists of a lot not intended to be designated.

See also other cases to the same effect cited in 94 A. I. R. 148.

Applying the law enunciated in the above cases, if it be assumed that a description of land in a homestead need not be more particular than in a conveyance, that the Declaration of Homestead in this case would be valid without the particular description, and that the general description, to wit, identifying the homestead as the land and premises located in the City of Los Angeles on which the declarant is now residing, would be sufficient without further specific description. Particularly would this be so under the liberal construction rule, where the land was also described by its tract number and map.

Again, it is to be noted that §1263 of the Civil Code does not require a legal description. That a legal description is not so required is firmly established by the case of Oktanski v. Burn, 138 Cal. App. 2d 419, wherein a Declaration of Homestead was upheld although it contained an incorrect legal description but a correct description by street and number.

In Murray v. Tulare, 120 Cal. 311, the court said:

"When property has a descriptive name it may be conveyed by that name and defects in other parts of the description may be disregarded."

(Citing 1092 Civil Code and other cases.)

To the same effect Martin v. Lloyd, 94 Cal. 195, 203.

In Reed v. Spicer, 27 Cal. 57: Holding that if a deed

recites two descriptions, one of which sufficiently identifies



the property while the other is false, the false description should be rejected.

In Henderson v. Henderson, 85 Cal. App. 2d 476, 480, the Appellate Court said:

"The description of real property in the complaint" . . . equity in real property situated in Shasta County, California, and standing in the joint names of the plaintiff and defendant "would be a sufficient description for a deed."

In Cornett v. Creech, (1907) 30 Ky. L. Rep. 1265, 100 S. W. 1188, the court said:

"It is true that, in the construction of deeds, particular or specific descriptions will control a general description, but this rule cannot be invoked when the particular description is evidently incomplete and defective, as in the deed before us. When it is apparent that a call from a deed has been omitted, or is set down erroneously, the court will read into the deed the omitted call, or correct the erroneous one, so that effect may be given to the intention of the parties, and the result intended by them be accomplished."

II.

THE DISTRICT COURT ERRED IN DETERMINING THAT THE REFEREE'S ORDER DATED DECEMBER 11, 1956 REFORMING THE DECLARATION OF HOMESTEAD COULD NOT BE REFORMED

Thus far in this brief it has been the contention of the appellant that the homestead was valid notwithstanding the Declaration contained an incorrect lot number, for the reason that the Declaration did contain the correct tract number and the correct book and page number of the map in the County Recorder's office.

In fact, there has actually been no adjudication that the homestead before it was reformed was void. The appellant proceeding on the assumption that an order would be signed sustaining the trustee's refusal to set aside the property claim to be exempt petitioned the referee for an order of reformation. The petition was granted and a judgment signed reforming the declaration of homestead.

The District Court held that "it is not possible under the California law to reform retroactively a defective declaration of homestead, which mistakenly failed to comply with statutory requirements into a valid declaration of homestead."

The court relied upon Carey v. Douthitt, 140 Cal. App. 412, Harris v. Duarte, 141 Cal. 497 and Gross v. Strelitz, 54 Cal. 640, also §3399 Civil Code.

In Carey v. Douthitt, supra, as stated earlier in this brief, the Appellate Court held that the trial court could not permit the "filing of an amended declaration with retroactive effect".

Language used by the Appellate Court in that case, which was decided in 1934, is in conflict with other decisions rendered by both the California District Court of Appeal and its Supreme Court.

In Oktanski v. Burn, 138 Cal. App. 2d 419, the District Court of Appeal, in January 1956, adopted with approval a statement appearing in the case of Donnelly v. Tregaskis, 154 Cal. 261, reading "great liberality in this respect (description) will be allowed". The Appellate Court also said, "The only purpose of a description is to reasonably identify the property intended and the description in a homestead declaration need not be more particular than in a conveyance". (Emphasis added.)

The California Supreme Court refused to disturb this decision denying the appellant's petition for a hearing.

In the Carey v. Douthitt case the court also said, "The sufficiency of a declaration must be determined from the statements expressly made therein and cannot be affected by any secret intentions which may have been in the mind of the claimant".

If, as the court has stated in the Oktanski case, a

description in a homestead need not be more particular than in a conveyance, clearly the decision in the Carey v. Douthitt case would be in conflict with not only the Oktanski case but with the numerous other decisions cited by the appellant in this brief, holding that a description of land containing a latent ambiguity is explainable by extrinsic evidence. There are numerous cases which hold that the parol evidence rule is applicable to homesteads. This line of cases was apparently not taken into consideration by the courts in either the Carey v. Douthitt case or the case of Harris v. Duarte. In that case, which was relief upon by the District Court, the homestead was constructed outside of the land described in their deed.

The Referee in this case in granting the petition for reformation, signed findings that the true description of the property is Lot 204, Tract 5069 etc., that it was the intention of the appellant and his wife to declare a homestead upon the real property; that the bankrupt and his wife have substantially complied with the provisions of the Civil Code. The Referee also, as conclusions of law, concluded that the bankrupt was entitled to a judgment of reformation of the declaration of homestead reforming and correcting the description according to the real intent of the parties.

In the following cases it was held that parol evidence was admissible in order to correct an erroneous description:

A. The Parol Evidence Rule is Applicable
to Homesteads.

In Re Kossack, 113 F.S. 884, the Referee found that the declarants did not place their signatures at the end of the purported Declaration of Homestead, and refused to accept any evidence as to the intent or purpose with which the purported declarants placed their signatures in the spaces provided at the end of the verification.

In reversing the Referee's Order, the Court of Appeal said:

"Since validity of the . . . (declaration) is the fact in dispute, the plainly declared exception to the parol evidence rule operates to render admissible evidence . . . other than the contents of the writing." California Code of Civil Procedure, §1856; see Turnbeaugh v. Santos, 146 Fed.2d 168; in Re Shepardson, 28 Fed.2d 353, once the instrument passes the test of the "four corners" rule and is held competent to be received.

In Steward v. U.S., 316 U.S. 353, the Supreme Court said:

". . . courts have repeatedly resorted to evidence of what was commonly known and called a ranch, or lot or other place in order

to correct erroneous boundaries stated in a deed description . . . "

To same effect Carter v. Bacigalupi, 83 Cal. 187, 193.

Redd v. Murry, 95 Cal. 48.

In Reamer v. Nesmith, 34 Cal. 624, the court says:

" . . . it was competent to ascertain by extrinsic evidence the precise location of the land in dispute and also the several calls or description in the deed. "

§3541 of the Civil Code provides as follows:

"An interpretation which gives effect is preferred to one which makes void. "

To same effect Blume v. MacGregor, 64 Cal. App. 2d

244.

§1070 of the Civil Code provides as follows:

"Irreconcilable provisions. If several parts of a grant are absolutely irreconcilable the former part prevails. "

The primary objective of all interpretations of a conveyance is to ascertain and give effect to the intention of the parties (9 Cal. Jur. 245 S. 119).

Blume v. MacGregor, 64 Cal. App. 2d 244:

"An omission of part of the boundaries or calls is not fatal to the validity of a deed where such boundaries or calls can be supplied

or the description rendered certain. "

Prudence v. Geist, 316 U. S. 88:

B. The Bankruptcy Court Has Jurisdiction
Under Its Equity Power to Order Reformation
of a Homestead Where the Referee in Bank-
ruptcy Finds There Has Been Substantial
Compliance with the Homestead Requirements

"The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed * * * A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. " (Citing Securities v. U. S. , 310 U.S. 434-455.)

In contrast it is the bankrupt's contentions that the homestead Declaration although imperfect in description, was valid under the liberal construction doctrine of the homestead case and, secondly, that the Referee did have plenary power over the assets of the bankrupt, and in the exercise of such power was authorized to permit the bankrupt to correct an error in

the description of property claimed to be exempt so as to remove the lien of the Trustee in Bankruptcy from said property where there had been substantial compliance with the homestead requirement as to description.

Remington on Bankruptcy, Vol. 5(a), p. 397 states the following:

"The Bankruptcy Court as a court exercising equitable jurisdiction may apparently in proceedings, marshal liens and determine rights in property in its custody, decree such equitable relief as the circumstances call for and warrant. Thus it may reform instruments. "

Remington on Bankruptcy, Vol. 5(a), p. 408, citing Fowler v. Hart, 14 Law Ed. 186, (13 How. 373).

Re: Traymore Shops, 300 Fed. 245.

It may determine homestead rights.

Moody v. Savings, 239 U. S. 374.

In Fowler v. Hart the bankruptcy court permitted a mortgage to be reformed. On appeal this procedure was objected to. The Supreme Court passing on this objection said

"The District Court had jurisdiction of the matter and it is but the ordinary exercise of the power of the court of chancery

to reform a mortgage or other instrument
so as to effectuate the intention of the
parties." (Emphasis added.)

In Hanlon v. Western Loan, 46 Cal. App. 2d 580, the
court said:

"Reformation was proper to reform a
description in a deed of trust and in all of
the subsequent documents which had perpetuated
the error."

In Gardner v. Johnson, 195 Fed. 2d 717, the Court of
Appeal said:

"The Bankruptcy Act declares the
policy of Congress to give effect to state
exemption laws, but once bankruptcy has
intervened, the time, manner and condition
under which such exemptions may be claimed
as against the trustee, are matters of federal
law and are determined by the Bankruptcy Act."

It is respectfully submitted that the Referee did have
jurisdiction to reform the description in the homestead, after
determining that there was substantial compliance with this
requirement, that parol evidence was properly received by the
Referee to identify the correct lot number, and that finally the
portion of the homestead which contained the incorrect lot
number could be properly disregarded by the Referee.

For all of the foregoing reasons, the appellant respectfully submits that the Order made by the United States District Court is erroneous and should be reversed.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant.

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of)	NO. 68,324-WM In Bankruptcy
)	
JOSEPH ESTEN,)	ORDER ON REVIEW OF
)	REFeree'S ORDER OF
Bankrupt.)	DECEMBER 11, 1956
_____)	REFORMING A DECLARATION
)	OF HOMESTEAD

[Filed April 3, 1957, Clerk, U. S. District Court,
Southern District of California, by C. A. Simmons, Deputy
Clerk.]

Upon the petition for review filed by the trustee on
December 19, 1956; upon the certificate of the Referee
Benno M. Brink, filed January 9, 1957; and upon the proceedings
had before the Referee as appear from his certificate; and
it appearing to the court that:

(1) "the [homestead] exemption here in
question is defined by California law . . .
[and] the Bankruptcy Act declares the policy
of Congress to give effect to state exemption
laws" [Gardner v. Johnson, 195 F.2d 717, 719
(9th Cir. 1952); Lynch v. Stotler, 215 F.2d 776,
778 (9th Cir. 1954); 11 U. S. C. §24];

(2) since the declaration of homestead filed before the petition in bankruptcy does not describe the property upon which the bankrupt resided, but instead mistakenly and clearly describes another lot in the same tract, this declaration of homestead does not substantially comply with the statutory and necessary requirement that "the declaration of homestead must contain: * * * a description of the premises" [Cal. Civ. Code §1263]; and so no notice of claim of homestead exemption was thereby given [Harris v. Duarte, 141 Cal. 497, 75 Pac. 58 (1903); Carey v. Douthitt, 140 Cal. App. 409, 35 P.2d 632 (1934); see also: Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421, 422 (1908); Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436 (1888); Oktanski v. Burn, 138 Cal. App.2d 419, 291 P.2d 386, 194 P.2d 809, 812 (1948); cf: Johnson v. Brauner, 131 Cal. App.2d 713, 281 P.2d 50, 56 (1955); In re Kossack, 113 F. Supp. 884 (S. D. Cal. 1953)];

(3) inasmuch as the trustee in bankruptcy is "vested by operation of law with the title of the bankrupt as of the date of the filing of

the petition" in bankruptcy [11 U. S. C. §110], the trustee's interest in the bankrupt's property cannot be altered by the filing of a declaration of homestead under California law after the petition in bankruptcy has been filed; hence the second declaration of homestead at bar, filed by the bankrupt's wife as owner of an undivided one-half interest in the bankrupt's residence, could not affect the trustee's undivided one-half interest in the bankrupt's residence [Schuler-Knox Co. v. Smith, 62 Cal. App. 2d 86, 144 P. 2d 47 (1943); Sampsell v. Straub, 194 F. 2d 288 (9th Cir. 1951), cert. denied, 343 U. S. 927 (1952)]; and

(4) it is not possible, under the California law, to reform retroactively a defective declaration of homestead, which mistakenly failed substantially to comply with statutory requirements, into a valid declaration of homestead [Carey v. Douthitt, supra, 140 Cal. App. at 412, 35 P. 2d at 633; see Harris v. Duarte, supra, 141 Cal. 497, 75 Pac. 58; Gross v. Strelitz, 54 Cal. 640 (1880); cf. Cal. Civ. Code §3399].

IT IS ORDERED that the Referee's order under review dated December 11, 1956, reforming the first declaration of

homestead, is hereby reversed.

IT IS FURTHER ORDERED that the Clerk this day
serve copies of this order by United States mail on

- (1) Referee Benno M. Brink;
- (2) the attorney for the Trustee; and
- (3) the attorney for the Bankrupt.

April 3, 1957.

Wm. C. Mathes

United States District Judge







